LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
MAY 15 1965
JOHN F. DAVIS, CLERK

No. [redacted] 144

IN THE

Supreme Court of the United States

October Term, 1965

HOWARD PRICE D/B/A HOWARD PRICE AND COMPANY

Appellant

v.

THE STATE ROAD COMMISSION OF WEST VIRGINIA, A CORPORATION, BURL A. SAWYERS, AS STATE ROAD COMMISSIONER, AND WILSON H. WARD, AS DIRECTOR OF THE CONSTRUCTION DIVISION, STATE ROAD COMMISSION OF WEST VIRGINIA

Appellees

ON APPEAL FROM THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

JURISDICTIONAL STATEMENT

CARNEY M. LAYNE
638 Fifth Avenue
Huntington, West Virginia

CHARLES W. YEAGER
608 Kanawha Valley Building
Charleston, West Virginia

Attorneys for Appellant

JARRETT PRINTING COMPANY, CHARLESTON, W. VA.

INDEX

	Page
OPINION BELOW	2
JURISDICTION	2
STATE CONSTITUTIONAL PROVISIONS INVOLVED	3
STATE STATUTES INVOLVED	4
QUESTIONS PRESENTED	5
HOW THE FEDERAL QUESTIONS ARE PRESENTED	6
STATEMENT OF THE CASE	9
THE QUESTIONS PRESENTED ARE SUBSTANTIAL	11
CONCLUSION	16
APPENDIX A Letter Opinion of November 7, 1963	1a
APPENDIX B Letter Opinion of April 13, 1964	9a
APPENDIX C West Virginia Declaratory Judgment Act	17a
APPENDIX D Rule 57, Declaratory Judgments, West Virginia Rules of Civil Procedure	20a
APPENDIX E Final Order of Dismissal Entered May 19, 1964	21a
APPENDIX F Pertinent State Constitution Provision	24a
APPENDIX G Pertinent State Statutes	25a
APPENDIX H Order Certifying Existence of Federal Question	28a

Page

APPENDIX I Complaint 30a

APPENDIX J Appellant's Reply Affidavit 50a

CITATIONS

CASES:

Torcaso v. *Watkins*, 367 U.S. 488 3

Delmas v. *Merchants Mutual*, 14 Wall. 661 3

Dahnke-Walker Milling Co. v. *Bondurant*, 257 U.S. 283 3

Standard Oil Co. v. *Johnson*, 316 U.S. 481 3

U.S. v. *County of Allegheny*, 322 U.S. 174 ..... 3, 15

Tregea v. *Modesto Irr. Dist.*, 164 U.S. 176 3

Virginia R. Co. v. *Mullens*, 271 U.S. 220 3

Nashville C. & St. L. R. Co. v. *Wallace*, 288 U.S. 249 3

Evers v. *Dwyer*, 358 U.S. 202 3

Land v. *Dollar*, 330 U.S. 731 ..... 3, 14

U.S. v. *Lee*, 106 U.S. 196 ..... 3, 14

Tindal v. *Wesley*, 167 U.S. 204 ..... 3, 14

Chicago, B. & Q. R. Co. v. *Chicago*, 166 U.S. 226 ..... 3, 13

Rolston v. *Crittenden*, 120 U.S. 390 ..... 3, 13

Sterling v. *Constantin*, 287 U.S. 378 ..... 3, 14

Board of Liquidation v. *McComb*, 92 U.S. 531 ..... 3, 14

West v. *Chesapeake and P. Tel. Co.*, 295 U.S. 662 ..... 3, 13

Prudential Insurance Co. v. *Cheek*, 259 U.S. 530 ..... 3, 13

Payne v. *Central P. R. Co.*, 255 U.S. 228 ..... 3, 14

Ickes v. *Fox*, 300 U.S. 82 ..... 3, 14

Page

Shelley v. *Kraemer*, *McGhee* v. *Sipes*, 334 U.S. 1. ... 13

Martin v. *Creasey*, 306 U.S. 219 ... 13

Noble v. *Union River Logging Co.*, 147 U.S. 165 ... 14

Mahone v. *State Road Commission*, 99 W.Va. 397, 129 S.E. 320 ... 14

Stewart v. *State Road Commission*, 117 W.Va. 352, 185 S.E. 567 ... 14

Houston v. *Ormes*, 252 U.S. 469 ... 15

State Road Commission v. *O'Brien*, 140 W.Va. 114 82 S.E. 2d 903 ... 15

FEDERAL CONSTITUTIONAL PROVISION:

Section 1, Fourteenth Amendment ... 6, 8, 9

STATE CONSTITUTIONAL PROVISIONS:

Section 35, Article VI, Constitution of West Virginia ... 3, 7, 8, 9, 11, 14

Section 52, Article VI, Constitution of West Virginia ... 4, 15, 24a

STATE STATUTES:

Chapter 17, Code of West Virginia, 1931, as Amended:

Article 2, Section 1 ... 4

Article 3, Sections 1, 2 and 4 ... 5, 25a

Article 4, Sections 19, 20 and 21 ... 5, 25a

MISCELLANEOUS:

Official West Virginia Blue Book, 1963 ... 12

No. ——

IN THE

Supreme Court of the United States

October Term, 1964

HOWARD PRICE D/B/A HOWARD PRICE AND COMPANY

Appellant

v.

THE STATE ROAD COMMISSION OF WEST VIRGINIA, A CORPORATION, BURL A. SAWYERS, AS STATE ROAD COMMISSIONER, AND WILSON H. WARD, AS DIRECTOR OF THE CONSTRUCTION DIVISION, STATE ROAD COMMISSION OF WEST VIRGINIA

Appellees

ON APPEAL FROM THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

JURISDICTIONAL STATEMENT

Appellant Howard Price d/b/a Howard Price and Company, appeals from the judgment of the Circuit Court of Kanawha County, West Virginia, entered on May 19, 1964, dismissing Appellant's complaint on the ground it constituted a suit against the State of West Virginia. On petition timely filed, the Supreme Court of Appeals of West Virginia, by order entered February 22, 1965, refused to review the judgment and returned the record to the Circuit Court of Kanawha County. The time for re-petitioning has expired. Appellant submits this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial federal questions are presented.

OPINION BELOW

The letter opinions of the Circuit Court of Kanawha County, West Virginia, dated November 7, 1963, and April 13, 1964, are not reported. Copies of the opinions are attached hereto as Appendix A and B respectively.

JURISDICTION

Appellant filed his declaratory judgment complaint in the Circuit Court of Kanawha County, West Virginia, on May 24, 1963, pursuant to Chapter 26, Acts of the West Virginia Legislature, Regular Session 1941, p. 132, (Appendix C), being Chapter 55, Article 13, Code of West Virginia, 1931, as amended, and Rule 57 of the West Virginia Rules of Civil Procedure, 144 W. Va. Reports, p. xcviii, (Appendix D). The complaint sought a declaratory judgment as to the rights of Appellant under a highway construction contract entered into by him with the State Road Commission of West Virginia, asking: (1) that the rights of the parties be declared; and sequentially, (2) that after a declaration of rights, the Road Commissioner be compelled to perform his statutory duty to audit Appellant's claim for work performed by Appellant.

On May 19, 1964, the Court entered its final judgment order sustaining Appellees' motion to dismiss the proceeding as a suit against the State. It is the judgment upon which review is sought (Appendix E).

Appellant thereupon filed his petition for appeal to the Supreme Court of West Virginia on December 30, 1964. On February 22, 1965, the Supreme Court of Appeals of West Virginia entered its order refusing to review the case. The time for repetitioning had expired and the record was returned to the Circuit Court of Kanawha County.

Notice of appeal to the Supreme Court of the United States was filed with the Circuit Court of Kanawha County on April 24, 1965.

The jurisdiction of the Supreme Court of the United States to review the judgment of the Circuit Court of Kanawha County, West Virginia, on appeal is conferred by Title 28, United States Code Section 1257(2). The application of a state constitutional provision as against the contention of its repugnancy to the Fourteenth Amendment on the facts of the case, is within the purview of such section *Torcaso* v. *Watkins*, 367 U.S. 488; *Delmas* v. *Merchants Mutual*, 14 Wall. 661; *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U.S. 282; *Standard Oil Co.* v. *Johnson*, 316 U.S. 481; *U. S.* v. *County of Allegheny*, 322 U.S. 174; *Tregea* v. *Modesto Ity. Dist.*, 164 U.S. 176. The Circuit Court of Kanawha County was the highest court in which a decision could be had. *Virginia R. Co.* v. *Mullens*, 271 U.S. 220.

The cause presents a justiciable controversy and meets the conditions which establish the validity of the declaratory procedure as set forth in *Nashville C. & St. L. R. Co.* v. *Wallace*, 288 U.S. 249 and *Evers* v. *Dwyer*, 358 U.S. 202.

The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on appeal in this case: *Land* v. *Dollar*, 330 U.S. 731; *U. S.* v. *Lee*, 106 U.S. 196; *Tindal* v. *Wesley*, 167 U.S. 204; *Chicago, B. & Q. R. Co.* v. *Chicago*, 166 U.S. 226; *Rolston* v. *Crittenden*, 120 U.S. 390; *Sterling* v. *Constantin*, 287 U.S. 378; *Board of Liquidation* v. *McComb*, 92 U.S. 531; *West* v. *Chesapeake and P. Tel. Co.*, 295 U.S. 662; *Prudential Ins. Co.* v. *Cheek*, 259 U.S. 530; *Payne* v. *Central P. R. Co.*, 255 U.S. 228; *Ickes* v. *Fox*, 300 U.S. 82.

STATE CONSTITUTIONAL PROVISIONS INVOLVED

1. Constitution of West Virginia, 1872 (as contained in Official Code of West Virginia, 1931, p. xlix), as Amended by House Joint Resolution No. 3, Acts and Resolutions of the 42nd Legislature of West Virginia, Regular Session 1935, p. 662; Chapter 23, same volume, p. 134, submitted

to voters; Ratified 1936. (The amendment added an exception pertaining to garnishment):

ARTICLE VI

* * *

STATE NOT TO BE MADE DEFENDANT IN ANY COURT

§35: *The State of West Virginia shall never be made defendant in any court of law or equity,* * * * (Italics supplied).

* * *

2. Constitution of West Virginia, 1872, as Amended by House Joint Resolution 6, Acts of the 45th Legislature of West Virginia, Regular Session 1941, p. 589; Chapter 11, same volume, p. 89, submitted to voters; Ratified November, 1942, adding section 52, Article VI. This section is also pertinent. It establishes the State Road Fund, directs that all revenues from highway users be paid into it, and provides that it be used for the "payment of obligations incurred in the construction . . . of public highways." (See Appendix F for text).

* * *

STATE STATUTES INVOLVED

Section 1, Article 2, Chapter 17 of the Code of West Virginia, 1931, as amended by the Acts of the Legislature of West Virginia as indicated after the section. (Note: Last official code of West Virginia published in 1931. Only official source of amendments thereto is in Legislative Acts. Michie's West Virginia Code of 1961 (unofficial) and the 1964 Supplement thereto conveniently compiles all sections and amendments thereto by the official code section, article and chapter designation).

ARTICLE 2. STATE ROAD COMMISSION

Section 1. STATE ROAD COMMISSION; PURPOSES AND RESPONSIBILITIES. — The State

Road Commission of West Virginia, heretofore created and *existing as a corporation,* shall be and is hereby continued as in this article provided. The commission is hereby authorized and empowered to adopt and use a seal; *to negotiate and enter into contracts; to institute, prosecute and defend suits, actions and proceedings;* and to otherwise exercise all powers and functions necessary and germane to its public corporate existence and purposes (Chapter 148, Acts of the Legislature of West Virginia, Regular Session, 1957, pp. 669; Chap. 17, Art. 2, Sec. 1 of Michie's West Virginia Code of 1961, (Serial Section 1445 (1)), p. 866.) (Italics supplied.)

* * *

2. The following statutes are also pertinent as pertaining to the State Road Fund, its use to pay the cost of road construction, the methods of disbursements therefrom, including the Road Commissioner's duty to audit contractors' claims and issue requisitions for their payment; and the direction that road construction shall be performed under contract awarded by bid and bonded, giving detailed statutory requirements:

Chapter 17, Code of West Virginia, 1931, as amended:

Article 3, Sections 1, 2 and 4

Article 4, Sections 19, 20 and 21

(See Appendix G for pertinent parts of above sections, and official reference to amending Acts of the Legislature)

QUESTIONS PRESENTED

Appellant filed a declaratory judgment complaint against the Road Commission and Road Commissioner asking a declaration of the rights of the parties under a highway construction contract between Appellant and Road Commissioner. Appellant alleged he had completed 80% of the contract; and that the Road Commissioner by arbitrary actions and without legal authority had stopped Appellant's

performance, abrogated his contract without paying him for all the work performed by him, and appropriated his material and services of a worth of $1,338,511.67 as incorporated into a public interstate highway. The Road Commissioner refused to certify for payment the $1,338,511.67 worth of work already performed under the contract and not paid for. As permitted by the West Virginia Rules of Civil Procedure the complaint asks that after the rights were declared, that Appellant be granted coercive relief compelling the Road Commissioner to perform his statutory duty to audit the claim, certify the work, and issue a requisition for its payment from the State Road Fund. On motion to dismiss the Court held the proceeding was against the State of West Virginia and absolutely prohibited. The questions presented are:

1. Were the actions of the Road Commissioner as alleged, and the action of the trial Court, in applying the immunity provision of the State Constitution, and dismissing the proceeding, repugnant to Section 1 of the Fourteenth Amendment to the Federal Constitution on the grounds that they:

   (1) Constitute a denial of due process of law by the State?

   (2) Constitute the taking by the State of private property for public use without just compensation?

   (3) Constitute a denial by the State of the equal protection of the law?

2. Does the application by the State Court of the immunity provision of the State Constitution, to Appellant's complaint, on Appellees' motion to dismiss, and without further proceeding on the merits, constitute a denial of due process of law under the Fourteenth Amendment of the Federal Constitution?

HOW THE FEDERAL QUESTIONS ARE PRESENTED

Appellees filed two successive motions to dismiss the complaint on the ground that the proceeding was a suit

against the State of West Virginia and prohibited by the immunity provision of the State Constitution. The motions were almost verbatim, but there were attached to the second motion affidavits (one 12 pages long) which were in essence a denial of the complaint and filed for the purpose of showing there existed a "substantial controversy of fact" between the parties. It was at this initial stage that the federal questions were raised.

The West Virginia Rules of Civil Procedure allow no responsive pleading to a motion to dismiss, and the federal questions were raised in argument, both orally and by brief, on the motions to dismiss. Appellant argued that the application to this case of the state constitutional provision on immunity, for work, material and services already performed by Appellant, and incorporated into the public highway, and for which the Road Commissioner had no right or authority to refuse to certify, and for which he had a statutory duty to audit, and issue a requisition for payment from the constitutionally established State Road Fund, would deny Appellant the due process and equal protection of law, and allow his property to be taken by the Road Commission for public use without any compensation to him.

The trial Court issued its opinion on the first motion by letter dated November 7, 1963, and on November 16, 1963 entered its order in conformity therewith, overruling said motion insofar as it pertained to the work performed and allowing Appellant to proceed as to declaring the rights for the work already performed and incorporated in the highway.

The trial Court issued its opinion on the second motion by letter dated April 13, 1964, and upon which was entered the final judgment order (Appendix E) sustaining Appellees' motion in its entirety and dismissing the proceeding on the ground that the proceeding was an action against the State of West Virginia.

The trial Court noted Appellant's constitutional arguments in its first opinion (Appendix A, p. 6a) stating:

> "Counsel for the plaintiff argue that the inhibition of Article VI, Section 35 of the Constitution is not absolute but, to the contrary, must be considered in the light of due process provisions of federal and state constitutions."

The Appellant's objections to the Court's ruling and his reasons therefor, were noted in the final order itself. The reasons embracing federal grounds read as follows:

* * *

> "2. The Court's ruling denies Plaintiff the rights guaranteed to him under Section 10, Article I of the Constitution of the United States, and under Section 1, Article XIV of the Amendments to the Constitution of the United States."

* * *

Appellant further raised the federal questions in his Assignments of Errors (Record p. 31) contained in his petition for appeal to the Supreme Court of West Virginia, the pertinent parts of which read as follows:

* * *

> "10. The dismissal of the action denied the Plaintiff the right of due process guaranteed under both the State and Federal Constitutions."
>
> "11. The dismissal of the action denied the Plaintiff the right to receive just compensation for private property taken for public use guaranteed by both the State and Federal Constitutions."

* * *

The objections and the assignment of errors were denied by the Circuit Court of Kanawha County and the Supreme Court of Appeals of West Virginia respectively.

An amplified restatement of these Federal questions appears in the order certifying the existence of Federal

questions and entered by the trial Court on April 24, 1965, (Appendix H), the pertinent parts of which read as follows:

> "... and it hereby is certified and by this order made a part of the record in this case, and of the final order of dismissal heretofore entered herein, that under the West Virginia Rules of Civil Procedure, no responsive pleading is permitted to a motion to dismiss; that in the arguments made in this Court on behalf of the Plaintiff, upon Defendants' motions to dismiss, it was insisted and relied upon by said Plaintiff, that the application of Section 35, Article VI of the Constitution of West Virginia to this case would deprive Plaintiff of his property without due process of law contrary to Section 1 of the Fourteenth Amendment to the Federal Constitution, and it became material and necessary to the determination of this case by this Court to determine this question so raised by the Plaintiff ..."

* * *

STATEMENT OF THE CASE

Appellant's complaint is attached as Appendix I. In essence it alleges as follows. Appellant entered into a highway construction contract with the Road Commission for the construction of a portion of Interstate Highway 64 (Appendix I, p. 32a). There is set forth the various statutory authorities and duties of the Road Commissioner to enter into such contracts, audit the claims for work and issue requisitions for the payment thereof from the State Road Fund. (Appendix I, p. 31a). The Appellee, Wilson Ward, as Director of the Construction Division is a representative and agent of the Road Commissioner. (By stipulation it was agreed that by statutory amendment the duty to audit claims and issue requisitions had been transferred from the Commission Members to the Road Commissioner. The Commission Members were dropped as parties.)

There is set forth pertinent contract provisions that the Appellant was to be paid by monthly estimate; that Appellant would be paid the unit bid price for the actual quanti-

ties necessary to complete the project, and a fair and reasonable price for items necessary and not included in the original contract; and that the work was under the supervision and control of the Commissioner and his engineers who had authority to suspend work if his orders were not carried out (Appendix I, pp. 32-33a). The items of work involved in this action, the prices, and the quantities thereof both as planned and as performed, were described in detail (Appendix I, pp. 33-36a, 38-40a, 42a, 47a).

Appellant was not paid by monthly estimate as required by the contract. *The total amount still due for work performed and now incorporated into the highway is $1,338,-511.67, which the Road Commissioner without right or authority has refused to audit and certify for payment.* (Appendix I, p. 470). The Appellees' affidavits in support of their second motion to dismiss admitted Appellant had not been paid for all his work (Record, p. 101).

The complaint further alleges numerous instances of arbitrary orders, contradictory orders, and capricious conduct, on the part of the Appellees, forcing Appellant to perform his work under conditions of hinderance, harassment and delay. All of such arbitrary and contradictory orders were issued by the Appellees under threats, either express or implied, of work suspension if not complied with by Appellant (Appendix I, pp. 35a, 37-41a, 43-44a).

When Appellant had performed approximately 80% of the work (Appendix I, p. 35a), and was insistent that the Road Commission pay him the monthly estimates for work performed, and otherwise abide by its contract, the Road Commissioner arbitrarily and without legal justification publicly declared his progress was unsatisfactory and his contract in default (Appendix I, p. 43a). Although requested so to do, the Road Commissioner refused to rescind this order (Appendix I, 46a). The Road Commissioner, over Appellant's protests, terminated his work, ordered him off the

project, and removed the Commission engineer so he could proceed no further (Appendix I, p. 44a). Appellant was not in default (Appendix I, p. 45a), and at the time he was removed from the project, Appellant's working time had not expired. The Road Commissioner re-let the contract to another contractor (Appendix I, p. 44a).

The majority of Appellant's contracts have been with the State Road Commission of West Virginia. Prior to the contract here involved, he has never had a contract declared in default, and in his 36 years of experience with the State Road Commission it has never expressed any dissatisfaction with the performance of his contracts (Appellant's Reply Affidavit to Appellees' Affidavits, Exhibit J).

Pending the Court's ruling on Appellees' second motion to dismiss, Appellees provisionally filed their answer and a counterclaim asking damages for $750,000. Appellant in turn filed a counterclaim to Appellees' counterclaim, for damages of $2,000,000, on the ground that the filing of the counterclaim by Appellees had waived any question of immunity. Both counterclaims were dismissed in the final order.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

The questions presented on this appeal involve the underlying questions: (1) whether or not the immunity of the State under West Virginia's peculiar constitutional provision is available as a defense to the Road Commission and the Road Commissioner under the particular allegations of Appellant's complaint and the relief sought therein; and (2) if so, at what stage such a defense can properly be raised.

1. The importance of these questions is of grave and immediate concern to all highway contractors doing business with the Road Commission. All highway construction in West Virginia is under the control of the Road Commis-

sion through the Road Commissioner, who undertakes it through contracts with private concerns. The Road Commissioner by law is vested with extensive powers, and with the expanding highway program in this State, he is entrusted with the expenditure of large sums of money and the control and responsibility for many and large construction projects. *If the Road Commissioner, under the facts of this case, can with the State's immunity shield his actions in dealing with these contracts and the handling of these large sums of money, the consequences are obvious and far-reaching.* It would sanction actions under color of office, whether intentional or unintentional, detrimental not only to the contractors, but to the road building program of this State and its general political and governmental well-being.

2. These questions are equally important to the citizens of this State who by constitutional mandate creating the State Road Fund, have earmarked for the Road Commission all revenue from highway users for the construction and maintenance of highways. *Similarly it is important to the Federal Government, which in promoting its national highway system, furnishes participating funds for projects undertaken by the Road Commission, the contracts for which are handled by the Road Commissioner.* 90% of the cost of the Interstate project here involved was paid for by the Federal Government. In the fiscal year 1961-62 the Road Commissioner spent approximately 30% of all funds spent by the State of West Virginia (Official West Virginia Blue Book, 1963, p. 953).

If the Road Commission and Road Commissioner are allowed to successfully resist judicial determinations of controversies that may arise with the contractors so that the contractors are unable to secure an impartial adjudication of their rights under their contracts, and as may be necessary, a compulsion of the Road Commissioner to perform his official duties, the inevitable consequence is that all contractors must price their services on all contracts in

such manner as will protect them from loss on one contract through arbitrary and unlawful actions by highway officials under the color of their offices. In the last analysis this poses a wasteful drain upon funds provided for the purpose by both the State and Federal governments.

3. The actions of both the Road Commissioner as alleged and of the trial Court in its dismissal, are both state action within the meaning of the Fourteenth Amendment *(Shelley* v. *Kraemer, McGhee* v. *Sipes,* 334 U.S. 1). Appellant's work, material and services already performed and incorporated into the public highway, and his rights under the contract are "property" with the protection of the due process and equal protection of law provision of the Fourteenth Amendment *(Prudential Ins. Co.* v. *Cheek,* 259 U.S. 530; The taking of property for public use is comprehended both in the meaning of the due process clause of the Fourteenth Amendment and of the Fifth Amendment as made applicable to the states by the privileges and immunities clause of the Fourteenth Amendment *(West* v. *C. & P. Tel. Co.,* 295 U.S. 662; *Chicago, B. & Q. R. Co.* v. *Chicago,* 166 U.S. 226; *Martin* v. *Creasey,* 360 U.S. 219.

4. This is a suit against the State Road Commissioner for wrongfully exceeding his authority, under color of office, and for failing to perform a statutory duty. The contract being with the Road Commission it was a necessary party to a declaration of the rights thereunder. The mere declaration of such rights does not constitute a suit against the State. Once these rights are judicially determined, it will be shown that the Road Commissioner failed to perform his statutory duty. Under the prayer for coercive relief, as permitted in West Virginia declaratory judgment procedure to be joined with the prayer for declaratory relief, the complaint sequentially asks that the Road Commissioner be compelled to perform his statutory duty. In this respect the holding of the lower court is in conflict with the decisions of this Court in *Rolston* v. *Crittenden,* 120 U.S. 390,

Payne v. *Central P. R. Co.*, 255 U.S. 228, *Ickes* v. *Fox*, 300 U.S. 82, *Board of Liquidation* v. *McComb*, 92 U.S. 531, and *Noble* v. *Union River Logging Company*, 147 U.S. 165, and contrary in principle to *Sterling* v. *Constantin*, 287 U.S. 378.

5. *Mahone* v. *State Road Commission*, 99 W. Va. 397, 129 S.E. 320 decided in 1925 by the State Supreme Court, held that the statute authorizing the Road Commission to be sued was unconstitutional as violating the prohibition that the State should never be made a party defendant. In *Stewart* v. *State Road Commission*, 117 W. Va. 352, 185 S.E. 567 (1936), and other cases, the State Supreme Court further held that this immunity was absolute and could never be waived by the Legislature, nor could the State or any of its instrumentalities ever consent to be sued. Despite these decisions, when the statute was amended in 1957 the Legislature nevertheless did not delete the consent to be sued, but on its reenactment reaffirmed its position that the Road Commission could sue and be sued, and thereby provided a legislative recognition of the requirements of due process.

The trial Court took the position that by virtue of the decisions of the State Supreme Court, the action as a declaratory judgment proceeding was per se an action against the State. It undertook then to consider it as a mandamus and held that by virtue of the affidavits there existed "substantial controversy of fact" and that mandamus would not lie. The trial Court's ruling in this respect, without the taking of evidence on the merits so as to determine whether the proceeding was against the State or the Road Commissioner, is in conflict with this Court's decision in the cases of *Land* v. *Dollar*, 330 U.S. 731; *U.S.* v. *Lee*, 106 U.S. 196, and *Tindal* v. *Wesley*, 167 U.S. 204. Only after the preliminary question as to the rights of the parties had been decided, and the same decided against the Appellant can there come into play any claim of sovereign immunity.

6. The lower Court was of the opinion that the proceed-

ing was against the State in view of the fact that to compel the Road Commissioner to perform his statutory duties would set in motion a sequence of events which would ultimately result in the payment of money from the State Road Fund. This holding is contrary in principle to the decision of this Court in *Houston* v. *Ormes*, 252 U.S. 469.

The State Constitution by creating the State Road Fund separates and segregates the revenues from highway users to be expended solely for the construction and maintenance of highways, and expressly provides they will be used for "the *payment of obligations incurred in the construction*, reconstruction, repair and maintenance of *public highways.*" This is a special fund; it does not constitute a part of the general revenues; cannot be used for general purposes but only the purposes aforesaid; and the payments from which are not on debts of the State. (*State Road Commission* v. *O'Brien*, 140 W. Va. 114, 82 S.E. 2d 903). *The statutes expressly gives to the Road Commission the legislative authority to enter into highway construction contracts, and as part of that authority attached the condition it may be sued.* The statute also makes it mandatory for the Road Commissioner to audit the contractor's claims and issue his requisition for the payment of those found correct.

7. The Federal Government by furnishing participating funds for certain projects, the contracts for the construction of which are handled by the Road Commission, has utilized the Road Commission as its agent in the exercise of its constitutional functions in effecting its national highway policy. The construction of these contracts, their consequences, the rights and obligations of the parties, present a question of federal law within the principle enunciated by this Court in *U. S.* v. *Allegheny County*, 322 U.S. 174.

8. The State Supreme Court by its prior decisions holding the Legislature can never consent to a suit, imposed a stringency in excess of the common law doctrine of immunity. Under such holdings it is impossible to give con-

sent, although in fact the Legislature has consented to suits against the Road Commission. Whether such absolute immunity, in the light of the Legislature's granting such consent, is valid, regardless of whether the proceedings concern property taken for public use without compensation, is a question never passed on by this Court.

9. These federal questions are substantial to Appellant not only because of the extent of the property of which he has been deprived, but also because *the Road Commissioner's action has deprived him of the right to earn a livelihood in his chosen occupation.* Highway construction contracts are required to be bonded and *it is impossible for Appellant to secure the necessary bonds for any work as long as the Commissioner's action in abrogating his contract stands unresolved.*

10. On motion to dismiss, the allegations of Appellant's Complaint must be assumed to be true. The facts alleged are that the Road Commissioner, by refusing to certify Appellant's work has appropriated $1,338,511.67 of Appellant's property as incorporated in the public highway, without compensation to Appellant. *Appellant has been deprived of his property for public use, denied his compensation therefor, and refused the opportunity to establish his rights. Appellant has not had his day in Court, he has not had the due process of law.*

CONCLUSION

The questions presented on this appeal are of public importance, effecting both the State and Federal highway construction program, the highway construction industry and the broad spectrum of governmental morality. They involve the accountability of state officials and the delicate balance between the prerogative of governmental authority and the constitutional rights of the individual. Appellant submits that the precedents established by this Court do

not support the decision of the Circuit Court of Kanawha County but require its reversal, and that the questions presented are so substantial as to require plenary consideration with brief on the merits and oral argument, for their resolution.

May 13, 1965

Respectfully submitted,

CARNEY M. LAYNE
638 Fifth Avenue
Huntington, West Virginia

CHARLES W. YEAGER
608 Kanawha Valley Building
Charleston, West Virginia

APPENDIX A

State of West Virginia

THIRTEENTH JUDICIAL CIRCUIT

Charleston

Frank L. Taylor
Judge

November 7, 1963

Carney M. Layne, Esq.
Attorney at Law
638 Fifth Avenue
Huntington, West Virginia

Charles W. Yeager, Esq.
Attorney at Law
Kanawha Valley Building
Charleston, West Virginia

Benjamin A. Ritchie, Esq.
Attorney at Law
Legal Division
State Road Commission
1800 Washington Street, E.
Charleston, West Virginia

Philip J. Sheets, Esq.
Attorney at Law
Legal Division
State Road Commission
1800 Washington Street, E.
Charleston, West Virginia

Lee M. Kenna, Esq.
Attorney at Law
Security Building
Charleston, West Virginia

Gentlemen:

Re Howard Price, etc. vs. The State Road Commission of West Virginia, etc., et al

This case, which now comes on upon the amended and supplemental motions of the defendants to dismiss the complaint of the plaintiff, was submitted upon briefs and oral argument.

The complaint of the plaintiff is lengthy. It alleges that a contract between the State Road Commission and the plaintiff for the construction of a portion of a highway known as Interstate 64, in Cabell County, West Virginia, was entered into on August 12, 1960. The contract, which is an exhibit to the complaint, is lengthy in and of itself, and includes by reference the "Standard Specifications For Roads And Bridges" of the State Road Commission of West Virginia, adopted in 1952. It provides, in essence, that the plaintiff would, in two hundred fifty working days, complete what may be referred to as the excavation, grading and filling necessary for paving the section of road referred to therein. According to the allegations of the complaint the contract "was entered into upon the basis of unit prices for estimated or planned quantities * * * of items of work and material, as estimated and planned by the Road Commission, * * *." It is further alleged that the total *estimated* contract price is based on estimated quantities and was in the amount of $1,352,235.48. The complaint further alleges that "the total estimated contract (was) subject to being adjusted on the basis of the agreed unit prices for the quantities actually required."

The complaint is replete with allegations which indicate the exercise of discretion by the defendants, and alleges that the project will require more work than was originally contemplated. The complaint and the exhibits filed therewith indicate that there were items of disagreement between the plaintiff and the defendants, and the allegation is made that

the Road Commission has declared the contract in default. It is further alleged that following this action there was a conference between the Road Commissioner and the plaintiff but that as a result of the conference no amendment of the default order was made and the job was shut down by the defendants. It is further alleged that the project was evaluated by a firm of consulting engineers, and thereafter the balance of the work to be performed was put out to bid and the low bid received for the completion thereof was in the amount of $1,037,855.02.

The complaint further alleges that the Road Commission, the Road Commissioner and the Construction Director of the Road Commission are without authority to declare the default, and without authority to withhold from the plaintiff the sum of money first mentioned, it being claimed by the plaintiff that this is the value of the work which he has done.

The complaint prays for a declaratory judgment declaring that the contract is not in default, that the plaintiff has the right to proceed with the performance of the contract, and that the Road Commissioner be required to certify the performance of the quantities of work which are complete and unpaid. The complaint also prays for coercive relief in addition to the declaratory relief in the following particulars:

1. That the defendants be compelled to cancel and set aside any and all records which may show the contract in default;

2. That the defendants be compelled to perform their duty and certify to the State Auditor the amount of work already performed by the plaintiff and the amount due therefor;

3. That the defendants be compelled to return a project engineer to the job in order that the plaintiff may proceed

with the work and that the defendants be restrained from interfering with the plaintiff in his return to work; and

4. That the defendants be enjoined from letting any other or further contract for the balance of the work to be performed on the project.

It will thus be seen that the complaint prays for various judgments of this Court upon matters which involve discretion upon the part of the defendants, as well as relief relating to the statutory requirement (Code, 17-3-4) that claims of contractors "shall be audited by the commissioner and, if found correct, the commissioner shall issue the commission's requisition upon the auditor of this state therefor * * *."

The defendants have filed their amended and supplemental motions to dismiss, which motions raise three issues:

1. That the individual defendants comprising the State Road Commission of West Virginia have no authority or jurisdiction perforce Code, 17-3-4, as amended by the Acts of the 1963 Legislature, with reference to construction contracts or contractor's claims, or to the issuance of requisitions upon the State Auditor.

2. That the State Road Commission, the State Road Commissioner, the members of the State Road Commission, and the Director of the Construction Division, are all public officials or employees, and acting within the scope of their authority in the exercise of a governmental function with the conclusion drawn that the present action is an action against the State of West Virginia and within the inhibition of Article VI, Section 35, of the Constitution of West Virginia.

This ground of the motion also raises the subsidiary issues that this action is in effect an action to recover money from the State Road Commission; that the acts complained of by the plaintiff involve the exercise of discretion by the

defendants; and that the plaintiff has not exhausted his statutory remedies established for the prosecution of claims against the State by proceeding through the office of the Attorney General and the State Legislature.

3. That the complaint "fails to state a cause of action for which relief can be granted."

This motion was filed pursuant to R.C.P. 12(b), (1) and (6). In *Lugar and Silverstein, West Virginia Rules*, the following language is found at page 101:

> "In general a motion under Rule 12(b)(6) to dismiss the complaint, 'for failure to state a claim upon which relief can be granted,' corresponds to the demurrer under the old practice, * * *."

See also *1A Barron and Holtzoff, Federal Practice and Procedure*, §356. At page 355 of that text the following language is to be found:

> "The motion performs essentially the same function as the former demurrer in actions at law, and the motion to dismiss for want of equity in suits in equity, but is not limited by the technical requirements which attached to those ancient and now outmoded devices."

At page 369, the same volume, this language is to be found:

> "The motion should be determined upon allegations of the complaint and undisputed facts as they appear from pleadings, orders, and records of the case."

In this connection I call attention to the language of the motion in paragraph B-3 thereof, viz: "in reference to and behind the matters alleged by the plaintiff, all of which for the purposes of this motion alone *defendants do hereby deny*, * * *." (Emphasis supplied.)

It is obvious that upon such a motion as this the defendants cannot traverse the complaint. However, I shall treat the quoted language as surplusage and attempt to test the complaint by its allegations.

Counsel for the plaintiff argue that the inhibition of Article VI, Section 35, of the Constitution is not an absolute but, to the contrary, must be considered in the light of due process provisions of federal and state constitutions. It is true that the West Virginia Court has by its opinions broadened the scope of declaratory relief to the extent that now actions against public officials are entertained with more liberality than was formerly the rule. However, counsel for the plaintiff rely heavily upon *Douglass* v. *Koontz*, 137 W.Va. 345, and make the statement in their brief that this case is controlling of the issues arising in the case at bar. *Douglass* v. *Koontz* was a declaratory judgment suit brought against the State Tax Commissioner to determine whether or not the Business and Occupation tax imposed by Chapter 11, Article 13 of the Code was applicable to a given state of facts, and it was held therein that such an action was not a suit against the State within the inhibition of the West Virginia Constitution. The following broad language is to be found at page 351 of the opinion:

> "The question whether this proceeding comes within the inhibitory provisions of West Virginia Constitution, Article VI, Section 35, is narrow, and may be tersely stated as follows: Can a declaratory judgment suit be maintained against the state tax commissioner, where, as in the instant proceeding, the petition does not seek to obtain money or other property belonging to the State, *or to control the discretion of an official* or to compel the State, or an official thereof, to execute a contract on behalf of the State, but simply alleges that the statute does not apply to the taxpayer and asks for a declaratory judgment bearing directly and solely on that issue." (Emphasis supplied.)

Tested by the rule laid down by that case, I can only reach the conclusion that the allegations of the complaint coupled with the several prayers therein, state a cause of action which in large measure would seek to have this Court control the discretion of the defendants. This conclusion ap-

plies to paragraphs numbered 1 and 2 in the prayer for declaratory relief, and the paragraphs numbered 1, 3 and 4 in the prayer for coercive relief. To the extent defined here, the motion to dismiss will be sustained.

In the case of *Draper* v. *Anderson*, 102 W.Va. 633, the syllabi are as follows:

> "The performance by public officials of a plain statutory duty, not involving the exercise of discretion or judgment on their part, may be enforced by the writ of mandamus."
>
> "Under Section 28, Chapter 43, Code, providing that any claim of contractors for labor done or material furnished to the State Road Commission pursuant to the provisions of the act shall be audited by the Commission, and if found to be correct, the Commission shall issue its requisition upon the auditor therefor, the Road Commission may be compelled by mandamus, at the instance of contractors in cases not involving a substantial controversy of fact, to issue a requisition upon the auditor for labor performed by them in the construction of a State road under a contract with the State, by the Road Commission."

Based upon this authority, I am of opinion at this time to overrule the motion to dismiss in so far as it relates to paragraph 3 of the prayer for declaratory relief, to paragraph 2 of the prayer for coercive relief, and to the allegations supporting these prayers. If there be no substantial issue of fact with reference to the amount of work done by the plaintiff prior to the time the defendants closed down the job and declared the contract in default, then the auditing of the work which he has done and the payment therefor requires no exercise of discretion on the part of the Road Commissioner, and such relief may be granted in this action. Of course a final determination of this issue will depend upon the issues of fact which may be raised by a responsive pleading to the complaint.

A proper order in conformity herewith should be ten-

dered for entry promptly. The defendants will then be allowed ten days in which to answer those portions of the complaint which relate to the performance of the non-discretionary acts on the part of the defendants. The order to be tendered should make this letter memorandum of opinion a part of the record, and a copy for that purpose may be obtained from my secretary.

Very truly yours,

FRANK L. TAYLOR, *Judge*

FLT:R

APPENDIX B

State of West Virginia

THIRTEENTH JUDICIAL CIRCUIT

Charleston

April 13, 1964

Frank L. Taylor
Judge

Carney M. Layne, Esq.
Attorney at Law
638 Fifth Avenue
Huntington, West Virginia

Charles W. Yeager, Esq.
Attorney at Law
Kanawha Valley Building
Charleston, West Virginia

Benjamin Ritchie, Esq.
Phillip Sheets, Esq.
Legal Division
State Road Commission
1800 Washington Street, E.
Charleston, West Virginia

Lee M. Kemna, Esq.
Attorney at Law
Security Building
Charleston, West Virginia

Gentlemen:

Re Howard Price, d.b.a. Howard Price & Company vs.
The State Road Commission of West Virginia, et al

This cause now comes on upon the defendants' motion for summary judgment and motion to dismiss the complaint for lack of jurisdiction, accompanied by the supporting affidavits of R. D. Bryant, Assistant Director of Construction

of the West Virginia State Road Commission, and Wilson W. Ward, Director of the Construction Division of the State Road Commission, and the opposing affidavit of the plaintiff, Howard Price; upon the plaintiff's motion to strike that portion of the defendants' answer designated "Answer Denying Jurisdiction"; and upon the defendants' motion to strike the plaintiff's counterclaim to the defendants' counterclaim, motion to dismiss the plaintiff's counterclaim for lack of jurisdiction, and for summary judgment on the plaintiff's counterclaim.

Counsel for the plaintiff contend that the affidavits submitted by the defendants may not be considered by this Court in the determination of the defendants' motion to dismiss the complaint for lack of jurisdiction. *Holnberg* v. *Williamson*, 135 F. Sup. 493, is cited for the proposition that consideration of a motion to dismiss must be confined to the pleadings. This rule, however, applies only to a motion to dismiss for failure to state a claim upon which relief can be granted under Rule 12(b)(6). *Doherty* v. *Federal Stevedoring Co.*, 198 F. Sup. 191 (D.C.N.Y. 1961). It is stated in *2 Moore's Federal Practice*, 2nd Ed., §12.09, page 2256, that there has never been any substantial doubt as to the availability of a speaking motion to present defenses under Rule 12(b)(1)-(5). To the same effect is *1A Federal Practice and Procedure, Barron & Holtzoff*, §352, page 340:

> "Affidavits may be considered on a motion to dismiss for want of jurisdiction; on such a motion, unlike a motion to dismiss for failure to state a claim or a motion for summary judgment, the court may weigh the affidavits and other evidence to determine the existence or nonexistence of the requisite facts. Questions of jurisdiction over the subject matter are addressed to the court and are not triable by a jury."

Two illustrative Federal decisions employing this rule are *Nash-Kelvinator Corporation* v. *California Refrigerator Repair Shop*, 11 F.R.D. 313 (D.C.Cal. 1950), holding that the

court may consider affidavits on a motion to dismiss an action for lack of jurisdiction without treating the motion as one for summary judgment, and *Williams* v. *Minnesota Mining & Manufacturing Co.*, 14 F.R.D. 1, (D.C. Cal. 1953), holding that the court may determine the jurisdictional facts from the affidavits and pleadings, grant the motion to dismiss on the basis of the facts so found, and at the same time, deny a motion for summary judgment because of a genuine issue as to a material fact. Therefore, since Rule 12(b), W.Va. R.C.P. is identical to Federal Rule 12(b), which is construed to permit speaking motions in determining jurisdiction, I am of opinion that the affidavits in this case may properly be considered in passing on defendants' motion to dismiss for lack of jurisdiction.

Without commenting on the propriety of instituting this action pursuant to the West Virginia Declaratory Judgment Act, governed by the new Rules of Civil Procedure, rather than by petition for writ of mandamus, excluded from the operation of the new rules, it must be recognized that the substantive right of a private individual or corporation to compel performance of a purely ministerial act by a public official under Code, 17-3-4 cannot be enlarged by the form or theory of the pleading instituting the action or proceeding. Therefore, the limitations of asserting a claim under Code, 17-3-4, heretofore prescribed and applied by the Supreme Court of Appeals of this State in mandamus proceedings, will be regarded as authority for a determination of the plaintiff's right in this case.

Objection is made to the defendants' motion to dismiss and motion for summary judgment on the ground that they are repetitious of defendants' previous motion to dismiss It is the plaintiff's contention that the reassertion of the motion to dismiss and the motion for summary judgment, accompanied by the affidavits in support thereof, are prohibited by Rule 12(g), R.C.P. I do not so construe Rule 12(g). The rule speaks of waiver in situations where the

"defense" or "objections" are omitted, rather than the form or manner in which the objection is made. In this case the defense of lack of jurisdiction was properly raised in the former motion to dismiss. The rules do not prevent subsequent filing of motions to dismiss and for summary judgment where such motions are not interposed merely for delay purposes.

It is also argued by counsel for the plaintiff that the question of jurisdiction is moot because the assertion of the defendants' counter-claim constitutes a waiver of immunity. Counsel relies upon *State* v. *Ruthbell Coal Co.*, 133 W.Va. 319, and *Road Commission* v. *Ball*, 138 W.Va. 349, as authority for the proposition that the assertion of a counterclaim by the State Road Commission constitutes a waiver of the constitutional immunity from suit and exposes the defendants to liability for any cause arising out of the construction contract. *Road Commission* v. *Ball*, *supra*, is not, as I construe it, authority for the proposition that an unliquidated counterclaim may be asserted against the State Road Commission. Although the first Syllabus point states that a defendant, in a tort action instituted by The State Road Commission, cannot recover "* * * unliquidated damages in *excess* of the amount charged in the plaintiff's declaration." (Emphasis supplied), which might possibly be construed as opening the door to counterclaims not in excess of the amount charged by the plaintiff, the text of the opinion rejected the unliquidated counterclaim on the waiver theory, stating that the counterclaim in tort constitutes a suit against the State, prohibited by Section 35, Article VI, West Virginia Constitution. It is also pointed out in that decision that in the *Ruthbell Coal Company* case, the counterclaim was liquidated, grew out of the transaction giving rise to the plaintiff's claim, that no affirmative relief was sought by defendant, and that the State had no direct or monetary interest in the fund involved. In view of the disparity of situations between the *Ruthbell* case and the case at bar, I am of opinion that the counterclaim asserted

by the State Road Commission does not constitute a waiver of its constitutional immunity.

The most perplexing issue involved in this case is the constitutional immunity question, raised by defendants' motion to dismiss for lack of jurisdiction, such motion being supported by the affidavits of R. D. Bryant and Wilson W. Ward, and opposed by the affidavit of the defendant Howard Price. It is the contention of the defendants that the plaintiff's claim involves numerous controversies, disputes of fact, differences of interpretation and opinion between the parties, and involves the exercise of discretion by the defendants, and may not, therefore, be enforced by coercive relief.

In ruling on the defendants' previous motion to dismiss plaintiff's complaint, by letter memorandum of opinion dated November 7, 1963, I overruled the motions as to the third paragraph of the prayer for declaratory relief, and the second paragraph of the prayer for coercive relief, primarily upon the authority of *Draper* v. *Anderson*, 102 W.Va. 633, construing Code, 17-3-4, stating in the two syllabi:

> "The performance by public officials of a plain statutory duty, not involving the exercise of discretion or judgment on their part, may be enforced by the writ of mandamus."
>
> "Under Section 28, Chapter 43, Code, providing that any claim of contractors for labor done or material furnished to the State Road Commission pursuant to the provisions of the act shall be audited by the Commission, and if found to be correct, the Commission shall issue its requisition upon the auditor therefor, the Road Commission may be compelled by mandamus, at the instance of contractors in cases not involving a substantial controversy of fact, to issue a requisition upon the Auditor for labor performed by them in the construction of a State road under a contract with the State, by the Road Commission."

However, the introduction of the affidavits requires a re-

examination of this Court's authority to assume jurisdiction of this case. Without resorting to a protracted comparison of each and every claim of plaintiff with the statements in defendants' affidavits concerning those claims, it would appear to be a fair statement of the undisputed facts to say that the entire claim of the plaintiff, and each item thereof, involves some substantial dispute, either as to the quantity or quality of the work done, or to the plaintiff's right to compensation for the work performed under the terms of the contract, or both. It should be noted at this point that paragraph six of the reply affidavit does not effectively contradict any of the statements in the defendants' affidavits since that sentence is merely a conclusion containing no specific averments of fact. The factual situation in *Draper* v. *Anderson, supra,* appears to be significantly different from the facts demonstrated by the affidavits in this case. In the *Draper* case, where the work was completed by the petitioner and accepted by the State Road Commission as fully complying with the terms of the contract, the concluding paragraph of the opinion states:

> "As the record does not in our opinion present any substantial issue of fact, and the position of the respondents not being justified as a matter of law under the terms of the contract, the peremptory writ will be awarded."

In *State* v. *Road Commission,* 108 W.Va. 41, in refusing a writ of mandamus to compel the State Road Commission to execute a requisition upon the State Auditor for work performed in the construction of a roadway, Judge Maxwell, in the majority opinion, makes the following observations of the *Draper* decision:

> "Our case of *Draper* v. *Anderson, et al,* 102 W.Va. 633, relied on by relators, does not sustain the position of relators in this particular. It is there held 'that * * * the Road Commission may be compelled by mandamus, at the instance of the contractors in cases not involving a substantial controversy of fact, to issue a requisition

> upon the auditor for labor performed by them in the construction of a state road under a contract with the State, by the Road Commission.' Clearly, the 'labor performed by them * * * under a contract' there referred to, is labor for which the contractors are to be paid under the terms of the contract,—not labor as to which there may be a legal question as to whether the contract contemplates compensation to the contractors. The *Draper* case only went to the extent of holding, as declared in syllabus one, that 'The performance by public officials of a plain legal duty, not involving the exercise of discretion or judgment on their part, may be enforced by writ of mandamus.' The converse is necessarily true. Where there is not a plain statutory duty to be performed mandamus will not lie. * * *."

There are numerous decisions by our Supreme Court of Appeals uniformly holding that before mandamus will lie to control the official acts of an individual or commission created by the State, the petitioner must show a clear legal right to the relief sought. *State ex rel. Dunn* v. *Griffith*, 139 W.Va. 894; *Childers* v. *State Road Commissioner*, 124 W. Va. 233; *State ex rel. Conley* v. *Pennybacker*, 131 W.Va. 442; and *State ex rel. Fox* v. *Board of Trustees*, The Syllabus Service, Supreme Court of Appeals of West Virginia, March 17, 1964. And where discretion is involved in the doing of an act or the refusal to act, the exercise of such discretion may not be controlled by mandamus. *Heavner* v. *State Road Commission*, 118 W.Va. 630; and *Reynolds* v. *State Road Commission*, 111 W. Va. 398.

While the requirement of clear legal right may seem harsh when applied to certain isolated situations, the necessity of the rule lies in the recognition of the very basic principle that the legislative, executive and judicial departments of the government must be kept separate and distinct, and each in its legitimate sphere must be protected. *Article V, Section 1, Constitution of West Virginia;* and *State ex rel. Miller* v. *Buchanan*, 24 W.Va. 362. In the very recent decision in *Cunningham* v. *County Court of Wood County*, 134

S.E. 2d 725 (W.Va. 1964), Judge Calhoun made the following observations:

> "Section 21 of Article VIII of the Constitution provides that the common law shall continue in force in this state 'until altered or repealed by the Legislature.' Similar language has been a part of the statutes of this state throughout the years of its existence. Code, 1931, 2-1-1. This Court, therefore, is sternly and unmistakenly enjoined to leave drastic changes in the common law to the legislative branch of the state government. Currently it is widely debated that the rule of governmental immunity should be abolished. We firmly believe, however, that this Court should not undertake, by judicial pronouncement to abrogate a legal principle which has through a long period of years been so basic in the laws of this state."

In view of the fact that the ultimate relief sought by plaintiff is the payment of money out of the treasury of the State Road Fund for claims uncontrovertedly shown to involve substantial controversies of facts by the affidavits, I am of opinion to sustain the defendants' motion to dismiss the complaint for lack of jurisdiction.

Finally, the counterclaim of the defendants, being asserted only under the protest that this Court has no jurisdiction of the plaintiff's claim, will be dismissed without prejudice.

A proper order in conformity herewith should be tendered for entry promptly, making this letter memorandum of opinion a part of the record. A copy for that purpose may be obtained from my secretary.

Very truly yours,

FRANK L. TAYLOR, *Judge*

FLT:R

APPENDIX C

Chapter 26, Acts of the West Virginia Legislature, Regular Session, 1941, p. 132, entitled "Uniform Declaratory Judgments Act", being Chapter 55, Article 13 of the Code of West Virginia, 1931, as Amended; Same, Michie's Code of 1961 (Serial Sections 5516(1) to (16)) p. 1131)

Section 1. POWERS OF COURTS TO DECLARE RIGHTS, STATUS AND OTHER LEGAL RELATIONS. —Courts of record within their respective jurisdictions shall have power to declare rights, status and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect; and such declarations shall have the force and effect of a final judgment or decree.

Section 2. WHO MAY HAVE DETERMINATION AND OBTAIN DECLARATION.—Any person interested under a deed, will, written contract, or other writings constituting a contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder.

Section 3. CONSTRUCTION OF CONTRACT BEFORE OR AFTER BREACH.—A contract may be construed either before or after there has been a breach thereof.

Section 4. DECLARATION CONCERNING TRUSTS AND ESTATES.

* * *

Section 5. ENUMERATION NOT RESTRICTION.—The enumeration in sections two, three, and four does not limit or restrict the exercise of the general powers conferred in section one in any proceeding where declaratory

relief is sought, in which a judgment or decree will terminate the controversy or remove an uncertainty.

Section 6. WHEN COURT MAY REFUSE JUDGMENT OR DECREE. The court may refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding.

Section 7. REVIEW OF ORDERS, JUDGMENTS AND DECREES.—All orders, judgments and decrees under this article may be reviewed as other orders, judgments and decrees.

Section 8. FURTHER RELIEF ON PETITION; SHOWING BY ADVERSE PARTY.—*Further relief based on a declatory judgment or decree may be granted whenever necessary or proper.* The application therefor shall be by petition to a court having jurisdiction to grant the relief. If the application be deemed sufficient, the court shall, on reasonable notice, require any adverse party whose rights have been adjudicated by the declaratory judgment or decree, to show cause why further relief should not be granted forthwith (Italics supplied).

Section 9. ISSUES OF FACT; TRIAL AND DETERMINATION.—*When a proceeding under this article involves the determination of an issue of fact, such issue may be tried and determined in the same manner as issues of fact are tried and determined in other civil actions in the court in which the proceeding is pending.* (Italics supplied).

Section 10. AWARD OF COSTS.

* * *

Section 11. PARTIES TO ACTION; MUNICIPAL ORDINANCE OR FRANCHISE INVOLVED.

* * *

Section 12. ARTICLE REMEDIAL; LIBERAL CONSTRUCTION AND ADMINISTRATION. This article is

declared to be remedial; its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations; and is to be liberally construed and administered.

Section 13. "PERSON" DEFINED.

* * *

Section 14. PROVISIONS SEVERABLE; EXCEPTIONS.

* * *

Section 15. INTERPRETATION AND CONSTRUCTION.—This article shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of the states which enact it, and to harmonize, as far as possible, with federal laws and regulations on the subject of declaratory judgments and decrees.

Section 16. CITATION OF ARTICLE.—This article may be cited as the "Uniform Declaratory Judgments Act."

APPENDIX D

WEST VIRGINIA RULES OF CIVIL PROCEDURE FOR TRIAL COURTS OF RECORD

Adopted and promulgated by order of the Supreme Court of Appeals of West Virginia entered October 13, 1959, effective on and after July 1, 1960, and as contained in 144 W. Va. Reports, p. xcviii.

* * *

RULE 57

DECLARATORY JUDGMENTS

The procedure for obtaining a declaratory judgment pursuant to the West Virginia Uniform Declaratory Judgment Act, Code, Chapter 55, Article 13, shall be in accordance with these rules, and the right to trial by jury may be demanded under the circumstances and in the manner provided in Rules 38 and 39. *The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate. A party may demand declaratory relief or coercive relief or both in one action. Further relief based on a declaratory judgment may be granted in the declaratory action* or upon petition to any court in which the declaratory action might have been instituted. The court may order a speedy hearing of an action for a declaratory judgment and may advance it on the calendar. (Italics supplied).

* * *

APPENDIX E

HOWARD PRICE d/b/a
HOWARD PRICE & Co.

vs. Civil Action No. 3479

THE STATE ROAD COMMISSION
OF WEST VIRGINIA, et al.

On days heretofore this cause came on to be heard on:

a. Defendants' motion for extension of time to answer;

b. Defendants' motion to dismiss the complaint for lack of jurisdiction and motion for summary judgment for lack of jurisdiction, each accompanied by supporting affidavits;

c. Defendants' answer, answer denying jurisdiction, and counterclaim;

d. Plaintiff's opposition in open court to defendants' motion for extension of time, and motion in open court to strike defendants' motions to dismiss for lack of jurisdiction and for summary judgment;

e. Plaintiff's reply affidavit in opposition to defendants affidavits;

f. Plaintiff's reply to defendants' answer, motion to strike defendants' answer denying jurisdiction, and counterclaim to defendants' counterclaim; and

g. Defendants' motion to dismiss for lack of jurisdiction and for summary judgment addressed to plaintiff's counterclaim to defendants' counterclaim;

and upon all of the previous pleadings, motions and papers filed herein and upon the briefs and arguments of counsel.

Whereupon the Court took time to consider its decision and after mature deliberation and collective consideration of the above pending motions and pleadings, is of opinion

to, and doth hereby, SUSTAIN the defendants' motion to dismiss the complaint filed herein for lack of jurisdiction, for the reasons expressed in a letter memorandum of opinion of the Court dated April 13, 1964, which letter memorandum of opinion is ORDERED to be, and is hereby, filed herein as a part of this order and made a part of the record of this cause.

It is accordingly ADJUDGED, ORDERED and DECREED that:

1. Plaintiff's complaint be, and it is hereby, dismissed;

2. Defendant's counterclaim, having been asserted only under protest that this Court has no jurisdiction of plaintiff's action, be and it is hereby, dismissed without prejudice; and plaintiff's counterclaim to defendants' counterclaim be, and it is hereby, dismissed without prejudice;

3. Defendants be, and they are hereby, awarded judgment against the plaintiff for their costs in their own behalf expended and a statutory fee of ten dollars.

To all of which action of the Court the plaintiff does object and except for the following reasons:

1. The Court's ruling denies plaintiff the rights guaranteed to him under Sections 9, 10 and 17, Article III of the Constitution of West Virginia.

2. *The Court's ruling denies plaintiff the rights guaranteed to him* under Section 10, Article I of the Constitution of the United States, and *under Section 1, Article XIV of the Amendments to the Constitution of the United States.* (Italics supplied).

3. The construction of a public road under contract to a private person is not a governmental function within the prohibition of Section 35, Article VI of the Constitution of West Virginia.

4. *Plaintiff's action* is not a suit against the State of

West Virginia within the prohibition of Section 35, Article VI of the Constitution of West Virginia, but *is an action to declare plaintiff's rights and compel the performance of a statutory duty by the defendant Burl A. Sawyers as State Road Commissioner.* (Italics supplied)

5. *The controversy of fact appearing on the pleadings does not establish a lack of jurisdiction under Section 35, Article VI of the Constitution of West Virginia.* (Italics supplied)

6. *The Court has jurisdiction to hear evidence to determine its jurisdiction, and on defendants' allegation that the action was a suit against the State and there is a dispute of fact, such jurisdiction can be determined only by evidence taken.* (Italics supplied)

7. On a dispute of fact appearing on the pleadings under a defense of the State's immunity, plaintiff was entitled to have evidence taken to establish his right by clear and convincing proof.

8. For such other reasons as may be later assigned by plaintiff.

ENTER:

FRANK L. TAYLOR
Judge

May 19, 1964
Inspected by:
LEE M. KENNA
Counsel for Defendants

CARNEY M. LAYNE
CHARLES W. YEAGER
Counsel for Plaintiff

APPENDIX F

Pertinent State Constitutional Provision

Constitution of West Virginia, 1872, as Amended by House Joint Resolution 6, Acts of the 45th Legislature of West Virginia, Regular Session 1941, p. 589; Chapter 11, same volume, p. 89, submitted to voters; Ratified November, 1942, adding the following new section:

ARTICLE VI

* * *

REVENUES APPLICABLE TO ROADS

§52. Revenue from gasoline and other motor fuel excise and license taxation, motor vehicle registration and license taxes, and all other revenue derived from motor vehicles or motor fuels shall, after deductions of statutory refunds and cost of administration and collection authorized by legislative appropriation, be appropriated and *used solely for construction,* reconstruction, repair and maintenance of *public highways,* and also the payment of the interest and principal on all road bonds heretofore issued or which may be hereafter issued for the construction, reconstruction or improvement of public highways, *and the payment of obligations incurred in the construction,* reconstruction, repair and maintenance *of public highways.* (Italics supplied)

APPENDIX G

PERTINENT STATE STATUTES

Chapter 17 of the Code of West Virginia, 1931, as amended by the Acts of the Legislature of West Virginia as indicated after the sections. (Note: Last official code of West Virginia published in 1931. Only official source of amendments thereto is in Legislative Acts. Michie's West Virginia Code of 1961 (unofficial) and the 1964 Supplement thereto conveniently compiles all sections and amendments thereto b ythe official code section, article and chapter designation).

ARTICLE 3. STATE ROAD FUND

Section 1. *There shall be a state road fund, which shall* consist of the proceeds of . . . When any money is collected from any of the sources aforesaid, it shall be paid into the state treasurer by the officer whose duty it is to collect and account for the same, and *credited to the state road fund, and shall be used only for the purposes named in this chapter, that is to say;* (a) To pay the principal and interest due on all state bonds issued for the benefit of said fund, and set aside and appropriated for that purpose; (b) to pay the expenses of the administration of the road department; (c) *to pay the cost of* maintenance, *construction,* reconstruction and improvement *of all primary roads;* (d) *to pay the cost of* maintenance, *construction,* reconstruction and improvement *of all secondary roads.* * * * (Chapter 3, Acts of the Legislature of West Virginia, 2d Extraordinary Session, 1933, p. 7; Chap. 17, Art. 3, Sec. 1 of Michie's West Virginia Code of 1961, (Serial Section 1449(1)); p. 873). (Italics supplied)

§ 2. COST OF CONSTRUCTION, RECONSTRUCTION, IMPROVEMENT AND MAINTENANCE OF STATE ROADS.—*The cost* and expense *of the construction,* reconstruction, improvement or maintenance *of all state roads shall be paid out of any moneys received by* or appropriated to *the state road commission for that purpose* (Chapter 17, Article 3, Section 2,

Official Code of West Virginia, 1931, p. 390; Same, Michie's Code of West Virginia 1961, (Serial Section 1450), p. 874.) (Italics supplied).

* * *

Section 4. METHOD OF DISBURSING ROAD FUND.—*Any claim of a contractor* or others, not otherwise provided for, *for labor done or for materials, services or supplies furnished to the state road commission,* pursuant to the provisions of any article of this chapter, *shall be audited by the commissioner, and, if found to be correct, the commissioner shall issue the commission's requisition upon the auditor of the State therefor,* showing the nature of such claim and whether it is for labor done or materials, services or supplies furnished for construction of state roads, or for other purposes, and the auditor shall issue his warrant upon the state treasurer therefor, and the treasurer shall pay the same to the person, firm or corporation entitled thereto, out of the funds in the treasury provided for that purpose. (Chapter 160, Acts of the Legislature of West Virginia, Regular Session 1963, p. 772; Chap. 17, Art. 3, Sec. 4 of Michie's Code of West Virginia 1961, 1964 Cumulative Supplement, (Serial Section 1452), p. 171.) (Italics supplied).

ARTICLE 4. STATE ROAD SYSTEM; PRIMARY AND SECONDARY ROADS.

Section 19. CONTRACTS FOR WORK AND MATERIALS; ADVERTISING AND BIDS; SERVICES BY STATE ROAD FORCES AND PRISON LABOR. —*All work of construction* * * * *of state roads* * * *, *and the furnishing of all materials and supplies therefor* * * * *shall be done and furnished pursuant to contract* * * * (Chapter 143, Acts of the Legislature, Regular Session, 1957, p. 687; Chap. 17, Art. 4, Sec. 19 of Michie's West Virginia Code of 1961 (Serial Section 1474 (1) (p. 880). (Italics Supplied).

Section 20. EXECUTION OF CONTRACT AND BOND BY SUCCESSFUL BIDDER; COPY FURNISHED CLERK OF COUNTY COURT; FORFEITURE OR RETURN OF CHECKS OR BONDS.— * * * (Chapter 3, Acts of the West Virginia Legislature,

Regular Session 1943, p. 78; Chap. 17, Art. 4, Sec. 20 of Michie's West Virginia Code of 1961 (Serial Section 1474(2) p. 881).

Section 21. FORM OF CONTRACT; SIGNING.— * * * (Chapter 40, Acts of the West Virginia Legislature, First Extraordinary Session 1933, p. 280; Chap. 17, Art. 4, Sec. 21 of Michie's Code of West Virginia, 1961 (Serial Section 1474(3) p. 882).

APPENDIX H

* * *

ORDER CERTIFYING EXISTENCE OF FEDERAL QUESTIONS

On motion of the Plaintiff, Howard Price, d/b/a Howard Price and Company, this Court, in addition to the orders made herein, orders it to be and it hereby is certified and by this order made a part of the record in this case, and of the final order of dismissal heretofore entered herein, that under the West Virginia Rules of Civil Procedure, no responsive pleading is permitted to a motion to dismiss; that in the arguments, made in this Court on behalf of the Plaintiff, upon Defendants' motions to dismiss, it was insisted and relied upon by said Plaintiff, that the application of Section 35, Article VI of the Constitution of West Virginia, to this case would deprive Plaintiff of his property without due process of law contrary to Section 1 of the Fourteenth Amendment to the Federal Constitution; and it became material and necessary to the determination of this case by this Court to determine this question so raised by the Plaintiff, and that this Court found that such Constitutional rights of Plaintiff would not be violated by sustaining Defendants' motion to dismiss, and the questions were determined adversely to said Plaintiff as appears from the entry of the final order of dismissal made herein.

This Court further orders it to be, and it is hereby certified and by this order made a part of the record in this case, that the petition to the Supreme Court of Appeals of West Virginia, from the final order of this Court, having been refused, that this is the highest Court in the State of West Virginia in which a decision could be had.

All of which is accordingly ADJUDGED and ORDERED,

and the Clerk directed to enter the within order and certificate in the Order Book of this Court.

ENTER:

FRANK L. TAYLOR
Judge of the Circuit Court
of Kanawha County, West Virginia

PRESENTED BY:
CHARLES W. YEAGER
of Counsel for Plaintiff

APPROVED:
BENJAMIN A. RITCHIE
of Counsel for S. R. C. et al

APPENDIX I

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

HOWARD PRICE dba
HOWARD PRICE and COMPANY,
Plaintiff,

vs.

For Declaratory Judgment
and Coercive Relief
Civil Action 3479

THE STATE ROAD COMMISSION OF WEST VIRGINIA, a corporation; BURL A. SAWYERS, as STATE ROAD COMMISSIONER; WILSON H. WARD, as DIRECTOR OF THE CONSTRUCTION DIVISION, State Road Commission of West Virginia; and CHARLES M. HARRISON, LOUIS E. PETITTO, WILBUR S. JONES, HAL M. SCOTT, RALPH S. SHEPLER, W. H. HANKS, and JOHN E. FAULCONER, as Members of and Constituting the State Road Commission of West Virginia,
Defendants.

COMPLAINT

This action is brought pursuant to the West Virginia Uniform Declaratory Judgment Act, Chapter 55, Article 13, Code of West Virginia, 1931, as amended, and in accordance with Rule 57 of the Rules of Covil Procedure, and the subdividing titles being placed for convenience of reference only, the plaintiff, Howard Price dba Howard Price and Company, says as follows:

THE DEFENDANTS

I

That the defendant The State Road Commission of West Virginia, hereafter referred to as "Road Commission", is a statutory corporation created and existing under and by virtue of Chapter 17, Article 2, of the Code of West Virginia, 1931, as amended; that the office of State Road Com-

missioner was created and exists under and by virtue of Chapter 17, Article 2A of the Code aforesaid; that the defendant Burl A. Sawyers, as State Road Commissioner of West Virginia, hereafter referred to as "Road Commissioner", has been duly appointed and is presently acting as such; that the defendant Wilson H. Ward, Director of the Construction Division of the State Road Commission, hereafter referred to as "Construction Director", has been duly appointed and is presently acting as such; that the office of Member of the State Road Commission of West Virginia is created and existing under and by virtue of Chapter 17, Article 2 of the Code aforesaid, and that Charles M. Harrison, Louis E. Petitto, Wilbur S. Jones, Hal M. Scott, Ralph S. Shepler, W. H. Hanks, and John E. Faulconer, hereafter referred to as "Commission Members", have been duly appointed and are presently acting as such; that by virtue of Chapter 17 of the Code aforesaid, the Road Commission and Road Commissioner are authorized to construct public roads and enter into contracts therefor; that it is the duty of the Construction Director and Road Commissioner to certify to the Commission the performance of work done under contract and the amounts due thereunder; and by virtue of Chapter 17, Article 3, Section 4, of said Code, it is the duty of the Commission and Commission Members to audit the claims of contractors and for those found correct to issue requisitions upon the State Auditor for payment thereof.

THE CONTRACT

II

That the Road Commission, acting through Patrick C. Graney, the then Road Commissioner for the State of West Virginia, did after bid award, enter into a contract, hereafter referred to as "contract", with the plaintiff, Howard Price dba Howard Price and Company, for the grading and draining of a certain portion of the roadway known as Interstate Highway 64, located in Cabell County, West Vir-

ginia, and more particularly designated as Project Number I-64-1 (37) 22, Cabell County, hereinafter referred to as "project", and which said contract is dated August 12, 1960; that the contract documents consist of (1) the contract instrument, (2) the contractor's proposal, (3) the Standard Specifications, Roads and Bridges, Of the State Road Commission of West Virginia, Adopted 1952, (4) the Special Provisions to said contract and amendments and revisions to said Standard Specifications, (5) the contract bond, and (6) the drawings and plans for said project, a copy of each of which, except the drawings and plans, is attached hereto and made a part hereof; Item 3, the Standard Specifications in book form being marked Exhibit 1, and Items 1, 2, 4 and 5 being in a single booklet and collectively marked Exhibit 2; that the plans and drawings are by reference made a part hereof, and will be tendered as Exhibit 3 upon the request of the Court or any party defendant hereto. That as required by statute and the contract, Plaintiff executed a bond for the faithful performance of said work with the United States Fidelity and Guaranty Company, a corporation, as Surety, hereafter called "Surety", and as a customary condition to obtaining said suretyship, Plaintiff executed the customary indemnification agreement with the Surety to the effect Plaintiff would save Surety from any loss.

III

That said contract was by bid, and was entered into upon the basis of unit prices for estimated or planned quantities, hereafter referred to as "estimated quantities," of items of work and material, as estimated and planned by the Road Commission, and the total estimated contract price, based on estimated quantities, was $1,352,235.48; that said estimated quantities are subject to the requirements of the project, being either more or less than estimated or planned, and the total estimated contract subject to being adjusted on the basis of the agreed unit prices for the quantities actually required.

IV

That said contract provides, among other things, as follows:

1. That the Road Commission would each month estimate the amount of work performed by Plaintiff and compute the value thereof from the unit prices, and after deducting Five (5) per cent retainage, pay Plaintiff therefor once a month for the work performed in the preceding month. (Contract, Paragraph 10)

2. That the Road Commission, subject to certain qualifications, would have the right to increase the quantities of work as may be necessary to complete the project, and that Plaintiff would perform any such item at the same price as that bid upon the original quantity. (Standard Specifications, Sec. 1.4.2., p. 12)

3. That for any item not included in the original contract there might be executed a supplemental agreement at a price therefor agreed by the parties as a fair and reasonable price. (Standard Specifications, Sec. 1.4.2, p. 12)

4. That the performance of all items of work would be under the supervision and control of the Road Commission through its Engineer, which Engineer is the said Wilson H. Ward by virtue of his position as Director of its Construction Division; and that the Road Commission would have the right to suspend work for various reasons, including failure of Plaintiff to obey and carry out orders of the Road Commission personnel. (Standard Specifications, Sec. 1.5.1, p. 16; Sec. 1.8.4, p. 31)

V

That each of the items of work covered by said contract included both the material concerned in said item and the work in putting said item in place, or as the case may be, in removing it from place, and that among, but not all, said items are the following:

1. Item 3-A, Borrow Excavation, the planned or estimated quantity of which, as determined by the Road Commission as necessary for said project, was 22,950 cubic yards, for which Plaintiff's bid and contract price was Seventy-Two Cents (72¢) per cubic yard; and which borrow is earth material secured by the contractor from off the right-of-way, measured in the "cut" of its removal, and used on the right-of-way as fill material.

2. Item 125, Special Rock Fill, the planned or estimated quantity of which, as determined by the Road Commission as necessary for the project, was 278,111 cubic yards, for which Plaintiff's bid and contract price was Seventy-Two Cents (72¢) per cubic yard; and which special rock fill is rock secured by the contractor either on or off the right-of-way, and which is measured in the "fill" (which is in place on the roadway) and used on the right-of-way as fill material of special quality.

3. Item 2, Unclassified Excavation, the planned or estimated quantity of which, as determined by the Road Commission as necessary for the project, was 1,525,000 cubic yards; for which Plaintiff's bid and contract price was Forty-Nine Cents (49¢) per cubic yard; and which unclassified excavation is material cut from the roadway area and measured in the "cut" of its removal, and when suitable, is used in the fills, and if unsuitable, is "wasted," that is, disposed of off of the project.

4. The following miscellaneous items of the following estimated quantities and bid prices:

ITEM NO.	DESCRIPTION	ESTIMATED QUANTITY	UNIT BID PRICE
6A	Structure Excavation	19,263 CY	$ 2.25
71	Class A Concrete	891 CY	55.00
107	Cr. Stone, Sand or Gravel for Underdrain	2,322 CY	7.50
107A	Cr. Stone, Sand or Gravel for Culvert Foundation	8,509 Tons	4.50

127A	Maintaining Traffic	Lump Sum	5,000.00
131C	Temporary Fence	8,500 LF	.15
136	Engineer Field Office	Lump Sum	3,000.00
138	Construction Layout Stakes	Lump Sum	10,000.00
42-c	24" Paved Invert CMP 14 GA	4,946 LF	6.75

CONDITIONS UNDER WHICH PERFORMANCE OF CONTRACT WAS HAD

VI

Plaintiff says that on or about September 6, 1960, he commenced the performance of work under said contract and on September 11, 1962, at the time his work was terminated by the Road Commission, he had performed approximately Eighty Per Cent (80%) of the original contract plus overruns. That the supervision and control of Plaintiff's work was under the Project Engineer (who reported to the Area Engineer), the Area Engineer (who reported to the Assistant District Engineer), the Assistant District Engineer (who reported to the District Engineer), the District Engineer (who reported to the Construction Director), the Regional Engineer (who also reported to the Construction Director), and the Construction Director of the Road Commission itself; that for some time prior to November 1961, Plaintiff was receiving direct from the various echelons of the Road Commission engineering personnel, contradictory and confused directions and orders, which directions and orders were under threats, express and implied, of work suspension for non-compliance, until matters reached such stage that Plaintiff did not know whose directions to follow; that through said period and due to the delays of the Road Commission personnel, it was impossible to satisfactorily proceed, and Plaintiff's equipment and work force were unable to work effectively on the project; that at the request of the Construction Director, the project was closed down

on or about November 1961 until the matters could be straightened out; that the project continued to be closed down until the latter part of April 1962; that shortly before the work resumption in the latter part of April 1962, at a conference held on April 4, 1962, it was agreed that Plaintiff would blend with borrow the silty material hereafter referred to in Paragraph XIII, remove certain portions of the special rock fill, with reservation of his rights thereunder, as referred to in Paragraph X, and proceed with several minor items, all as set forth in the letter dated April 16, 1962, from Plaintiff to the District Engineer of the Road Commission confirming such, a copy of which letter is attached hereto marked Exhibit 4, and the Road Commission agreed that it would take the necessary steps to immediately pay Plaintiff for the borrow, referred to in Paragraph VIII; that Plaintiff proceeded according to each particular of his agreement under the direction and supervision of Road Commission personnel, and to their complete satisfaction, until he had reached the point in the orderly progress of work and proper sequence of performance, where he had to borrow more material to place in the fill and be allowed by the Road Commission onto the adjoining project to obtain more special rock fill, and again Plaintiff was delayed by the inaction of the Road Commission and its personnel, and his equipment and work force were unable to work effectively while awaiting their decisions.

BORROW EXCAVATION

VII

That said 22,950 yards of borrow as originally estimated by the Road Commission was insufficient for the completion of the project, and Plaintiff says that the project will require approximately 190,835 cubic yards; that the Road Commission further determined that additional material of a borrow nature was required, which it classified as random borrow, an item of material not listed in the contract, and

the Road Commission estimated the amount of random borrow required as being approximately 35,000 cubic yards, and that the Road Commission and Plaintiff agreed that a fair and reasonable price therefor was the sum of $1.50 per cubic yard.

VIII

That in the spring of 1961, Plaintiff advised the Road Commission that the borrow required would exceed the estimated quantity, and the Road Commission through the Construction Director, on October 6, 1961, did prepare a change order increasing the estimated quantity of borrow, and did forward same to the Plaintiff, that said change order was signed by Plaintiff and his Surety and returned to the District Engineer, and thereafter forwarded to the Construction Director; that after said order was received by the Construction Director, he prepared another in its place for the stated reason some change was required in the contents and such new change order was forwarded down, signed by Plaintiff, his Surety, and the District Engineer, and returned to the Construction Director, where again the same action was repeated and the same sequence of events followed, and the Plaintiff signed approximately five such change orders, all covering the matter of quantity of borrow, the last of which change orders was dated July 6, 1962, a copy of which is attached hereto marked Exhibit 5 and made a part hereof; that a short time previous to the time of the last change order on borrow the said Construction Director also prepared and sent to Plaintiff a supplemental agreement on random borrow; which agreement provided for a price of $1.50 per cubic yard as agreed upon between the Road Commission and Plaintiff, and which supplemental agreement was on June 15, 1962 likewise signed by Plaintiff, his Surety and the District Engineer, and returned to the Construction Director; that said Construction Director during the period covered by the execution of the change orders did not furnish Plaintiff a signed copy of

any of the change orders for the stated reason a new and superseding one was to be issued, and in the summer of 1962 shortly before and at the time of the alleged default, refused to furnish Plaintiff any signed copy of a change order or a signed copy of the supplemental agreement on random borrow.

IX

That after the execution of said first change order by Plaintiff, his Surety, and the District Engineer, Plaintiff was directed by the Construction Director to borrow in excess of the originally estimated quantity and to place the additional amounts in the roadway, which Plaintiff did and continued to do, according to the specifications, as necessary for the roadway construction, and under the inspection and at the insistence of the Road Commission, and that he has placed therein approximately 69,975 cubic yards of borrow in addition to the estimated quantity of 22,950 cubic yards, of value at bid price in the amount of $64,377.

SPECIAL ROCK FILL

X

The item of special rock fill was to be placed in three locations upon the roadway project, the only one here pertinent being the east side of Mud River where it crosses the right-of-way; that Plaintiff secured sources of material suitable for special rock fill, and while to Plaintiff's knowledge no test of suitability of special rock fill is required other than visual inspection, nevertheless the Road Commission had said material examined by laboratory analysis, found it suitable, and approved it for use as special rock fill, a copy of the laboratory reports on which, and letter from Smokey Ball, Project Engineer, are attached hereto, collectively marked Exhibit 6 and made a part hereof; that on November 4, 1960, Plaintiff commenced the performance of this item and placed said special rock fill at the locations called for, with the approval and under the direction and

supervision of the Road Commission personnel; that the performance of said work was included in the monthly estimates, certified by the Construction Director and Road Commissioner to the Commission and Commission Members, approved for payment, and paid for by the Road Commission; that after approximately 100,000 cubic yards of this item had been so placed by Plaintiff, the Road Commission informed Plaintiff a part thereof in the fill on the east side of Mud River was not suitable for special rock fill, and under threat of suspending work on the project for non-compliance, directed Plaintiff to remove 51,442 cubic yards thereof; that after objection and reserving his rights (see Exhibit 6 herewith), Plaintiff on the Road Commission's express direction, removed said 51,442 cubic yards; that after the removal of said rock, the Road Commission, on the next monthly estimate received by Plaintiff, deducted from the amount due Plaintiff for other items of work performed by him, the sum of $37,038.24, representing the 51,442 cubic yards of special rock fill for which the Road Commission had previously paid and then required Plaintiff to remove it. That the cost of said removal of said rock is in excess of the cost of its placement, and a reasonable price for such removal is $2.00 per cubic yard, for a total sum of $102,884, and that Plaintiff claims under the contract he has a right to be paid said said sums of $37,038.24 and $102,884. That Plaintiff placed a total of 160,103 cubic yards of special rock fill, not including the 51,442 cubic yards placed and removed as aforesaid; that of such 160,103 cubic yards, Plaintiff has been paid for 123,558 cubic yards only; that Plaintiff has not been paid for the balance of 36,545 cubic yards, which at bid price is of the value of $26,312.40, and that he has a right to be paid said sum of $26,312.40.

XI

That to replace the said 51,442 cubic yards removed from the special rock fill, and to complete the special rock fill, the Road Commission by laboratory analysis approved

certain material located partly on and partly off the adjoining highway project, hereafter referred to as "Robertson-Fowler project", the quantity which was partly off said adjoining Robertson-Fowler project being accessible only from said adjoining project, which approval is evidenced by Report on Sample, Laboratory No. 100399, a copy of which is attached hereto morked Exhibit 7; and the Road Commission agreed that it would make a partial acceptance of the roadway area and agreed that Plaintiff could traverse such part of said roadway area to secure the material, which is usual and customary procedure; that notwithstanding said agreement, in the summer of 1962, when the contractor on the Robertson-Fowler project completed the phases of work necessary to allow Plaintiff to traverse part of the roadway to the material source, the Road Commission took no steps to accept said phases of work, although often requested to do so by Plaintiff.

UNCLASSIFIED EXCAVATION AND BLENDING

XII

That upon the direction and order of the Road Commission, Plaintiff was required at various places to excavate below the rough grade line so as to reach stable material, which excavation increased the planned quantity of unclassified excavation; that Plaintiff excavated a total of 1,676,369 cubic yards of unclassified excavation, and has been paid for 1,377,570 cubic yards thereof; that Plaintiff has not been paid for the balance of 298.799 cubic yards, which at bid price is of the value of $146,411.51, and that Plaintiff under said contract claims he has a right to be paid said $146,411.51.

XIII

That upon the direction and order of the Road Commission personnel, under threat of shut-down for non-compliance, Plaintiff was required to place material from unclassified excavation which was silty, of high water

absorption and without compaction, in said fill; that the Road Commission, perceiving the fill would alck suitability, then required Plaintiff to place suitable material in the fill,, and, attempting to give such material some binding and compacting quality, directed and ordered Plaintiff, under threat of shut-down for non-compliance, to blend the silty material with suitable material, either unclassified excavation and suitable for fill, or with borrow secured from off the project. That said blending operation or manipulation was not an item in the contract, but is a pay item paid for by the Road Commission as a separate item, the reasonable and fair price of which is Fifty (50) Cenats per cubic yard; and that Plaintiff was compelled to blend approximately 312,600 cubic yards of a total value of $156,300.00, and that Plaintiff claims under the contract that he has a right to be paid the sum of $156,300.00.

EQUIPMENT RENTAL AND OTHER EXPENSE
XIV

That during the numerous delays and after the project was closed down in November 1961, and after resumption of work in April 1962, and during the further delays occasioned by the Road Commission's failure to provide a borrow change order as alleged in Paragraph VIII and its failure to accept the portion of the Robertson-Fowler project so Plaintiff could secure special rock fill, as alleged in Paragraph XI, much of Plaintiff's equipment and work force were unable to work effectively; that by letter of November 6, 1961 to the District Engineer, copy of which is attached hereto marked Exhibit 8, the Road Commission was notified of Plaintiff's charge for equipment rental and other expenses and that he did not expect to be charged with working time for the periods in which he had been delayed by the Road Commission; that the equipment rental and stand-by expense is part of the cost of said project, and is a separate item customarily paid for by the Commission, and that the cost of such equipment rental is

$681,881.57, and the cost of other stand-by expense is approximately $95,000; and that Plaintiff claims he has a right to be paid said sums of $681,881.57 and approximately $95,000.

MISCELLANEOUS ITEMS PERFORMED AND UNPAID
XV

The following miscellaneous items, as referred to in Paragraph V, Subparagraph 4, have been performed by Plaintiff in the quantities indicated; that all of the quantities are within the estimated quantities, and which at bid price are of the values as indicated, and that Plaintiff has not been paid the sums due for the quantities indicated:

Item No.	Description	Unit Bid Price	Total Quant. Performed	Quantity Unpaid	Amount
6A	Structure Excavation	$ 2.25 CY	13,166 CY	3,216	7,236.00
71	Class A Concrete	55.00 CY	891 CY	16	880.00
107	Cr. Stone, Sand or Gravel for Underdrain	7.50 CY	1,045 CY	486	3,645.00
107A	Cr. Stone, Sand or Gravel for Culvert Foundation	4.50 Ton	8,509 Tons	459	2,065.50
127A	Maintaining Traffic	Lump Sum 5,000.00	100%	100%	5,000.00
131C	Temporary Fence	.15 LF	8,500 LF	2,433	364.95
136	Engineer Field Office	Lump Sum 3,000.00	100%	33-1/3%	999.00
138	Construction Layout Stakes	Lump Sum 10,000.00	100%	30%	3,000.00
42-c	24" Paved Invert CMP 14 GA	6.75 LF	2,031 LF	1,064	7,182.00

Plaintiff claims that under the contract he has a right to be paid the sums so indicated totaling $28,306.95.

THE ALLEGED DEFAULT

XVI

In July 1962, the District Engineer and Road Commissioner advised Plaintiff the progress on the work was not satisfactory to them, and noted six matters which Plaintiff says were not valid objections to the progress of his work, and the Road Commissioner threatened to take the project from Plaintiff; by letter dated July 23, 1962, Plaintiff replied, showing that said six matters were not valid objections, a copy of which letter is attached hereto marked Exhibit 9, and to which reference is made for full details of the reply; and as appears therefrom, all of the Road Commission's objections were without substance; that by letter dated August 21, 1962, the Road Commissioner notified Plaintiff the Road Commission had defaulted his contract, on the alleged grounds Plaintiff "has delayed, neglected and defaulted . . . to commence the performance and completion of the work", a copy of which letter is attached hereto, marked Exhibit 10; that at Plaintiff's request the Road Commissioner shortly thereafter held a conference, at which time the Road Commission flatly refused to take the necessary steps to secure to Plaintiff payment for the borrow which the Commission had previously directed Plaintiff to place in the project, and forbade him to do any of the other items of work which it was Plaintiff's right to prosecute; and to the end that the Road Commission might possibly rescind the notice of alleged default, demanded that Plaintiff forthwith proceed with replacing special rock fill which it ordered him to remove; that Plaintiff then agreed that with the Project Engineer he would recanvass the locality to determine if any other material sources were available and acceptable to the Road Commission for special rock fill; and the Road Commission agreed it would take immediate steps to expedite the accept-

ance of a portion of the adjoining project so that special rock fill could be obtained therefrom, and that another conference would be held as soon as Plaintiff had canvassed the locality; that Plaintiff canvassed the locality with the Project and samples were taken from further sources, and the Road Commission of its own volition resampled the source on the adjoining project which is had previously approved as shown by Exhibit 7, which samples from further sources the Road Commission declared unsuitable, and the resampling from the previously approved source on the adjoining project the Road Commission then also declared unsuitable, as shown by Exhibit 11 attached hereto; that the Road Commission then took no action to accept the adjoining project, that Plaintiff had no approved material which he could immediately place in the special rock fill; that the Road Commission refused any further conferences, ordered Plaintiff from the project, and when he continued to work the items which could still be performed, removed the Project Engineer so he could proceed no further.

XVII

That the Road Commission, after said alleged default, did cause the project to be cross-sectioned by the firm of Michael Baker, Jr., Consulting Engineers; that Plaintiff had a right to, and requested that there be furnished him the complete results of the survey by Michael Baker, Jr., Inc., which results would show all of the work performed by him, but such right and request was refused by the Construction Director; that thereafter the Road Commission did advertise the balance of the work to be performed for a re-letting, and that the low bid received for the completion of the balance of the work was $1,037,855.02; that the Road Commission has informed Plaintiff that under the terms of the contract and bond it will charge back to such sums as may be due him from the Road Commission and to the bond obligation of himself and his Surety, such cost of completion of said project as exceeds the amount that would

have been paid to Plaintiff for completion. That the Road Commission, as an arm of the State, is immune from suit for damages, and remedy therefor would be entirely unavailing for compensation of Plaintiff's loss, and that the Road Commission has publicly declared Plaintiff has defaulted on said contract; and by said declaration has damaged and continues to damage Plaintiff in business and personal standing, and if the Road Commission is permitted to re-let said contract, this Plaintiff will be irreparably injured.

XVIII

Plaintiff claims that the Road Commission, the Road Commissioner and Construction Director were without right or authority in holding Plaintiff to be in an alleged default of said contract and in ordering Plaintiff from the project and subsequently attempting to re-let same, for the following reasons:

1. That by refusing to provide Plaintiff with borrow change orders, and by refusing to pay Plaintiff for the borrow which he had placed in said roadway under the direction and supervision of the Road Commission, the Road Commission was in default of the contract in a manner which rendered impossible Plaintiff's further performance of the work.

2. That by compelling Plaintiff, under threat of shutdown for non-compliance, to blend unsuitable material with suitable material in an attempt to upgrade its quality, and without paying him for such operation, the Road Commission was in default of the contract in a manner which rendered impossible Plaintiff's further performance of the work.

3. That by compelling Plaintiff, under threat of shutdown for non-compliance, to remove 51,442 cubic yards of special rock fill as unsuitable material, which material was in fact suitable and which the Road Commission had previously approved and directed and supervised its place-

ment, without paying him for such removal, and in back-charging him for the amount already paid for its placement, the Road Commission was in default of the contract in a manner which rendered impossible Plaintiff's further performance of the work.

4. In compelling Plaintiff, under threat of shut-down for non-compliance, to immediately proceed with replacing the special rock fill, to the exclusion of all other items of work, the performance of which was his right, and after Plaintiff had already once placed such fill with suitable material, the Road Commission was in default of the contract in a manner which rendered impossible Plaintiff's further performance of the work.

5. That by delaying Plaintiff in his performance of the work, the Road Commission was in default of the contract in a manner which rendered impossible Plaintiff's further performance of the work.

6. In inducing Plaintiff to rely on traversing part of the adjoining project that he might secure special rock fill acceptable to the Commission, and then precluding him from securing it and immediately demanding that he forthwith replace the special rock fill, the Road Commission failed to cooperate and was in default of the contract in a manner which rendered impossible Plaintiff's further performance of the work.

7. That by refusing to pay Plaintiff for all of the unclassified excavation, for all of the special rock fill, and for the miscellaneous items of work performed as set forth in Paragraph V, Subparaph 4, the Road Commission was in default of the contract in a manner which rendered impossible Plaintiff's further performance of the work.

And although requested so to do, the Road Commission has refused to rescind its notice of alleged default and denies Plaintiff's claim that Plaintiff is not in default of said contract.

XIX

Plaintiff claims that under the contract the Road Commissioner and Construction Director were without right or authority in failing to certify, and that they each did have a duty to certify, the performance of the items of work and the services and materials supplied, and the amounts due therefor, as referred to in the paragraphs enumerated following:

Paragraph	IX	$ 64,377.00
"	X	37,038.24
"	X	102,884.00
"	X	26,312.40
"	XII	146,411.51
"	XIII	156,300.00
"	XIV	681,881.57
"	XIV	95,000.00
"	XV	28,306.95
TOTAL		$1,338,511.67

And Plaintiff claims under the contract he has a right to be paid the said sum of $1,338,511.67 for the work performed, as hereinabove set forth; that the Road Commission and Commission Members have no right or authority to withhold payment of the above sums, and have a duty to certify and issue requisitions for the payment thereof upon the State Auditor; and that the same has not been done and that the same have not been paid; that same is past due and owing from the Road Commission to Plaintiff, and although payment has been requested, the Road Commission and Road Commissioner have denied Plaintiff's claim and right to payment and have refused certification of the performance and the issuance of requisition for payment thereof upon the State Auditor.

WHEREFORE, the Plaintiff prays that the Court will:

1. Hear evidence on the disputed questions of fact to be submitted to a jury, trial by jury being herewith demanded.

2. Declare that said contract is not in default by the Plaintiff, and declare the right of the Plaintiff to proceed with the performance of the contract.

3. Declare the right of the Plaintiff to have the Construction Director and Road Commissioner certify the performance of said quantities of work which are completed and unpaid; and the right of the Plaintiff to have the Road Commission and Commission Members issue requisitions for the payment thereof upon the State Auditor.

And for further and coercive relief the Plaintiff asks judgment as follows:

1. That the Commission Members and the Road Commissioner be compelled to cancel and set aside for naught any such part of the records of the Road Commission as may show said contract in default.

2. That the Construction Director and Road Commissioner be compelled to perform their duty and certify to the Road Commission and Commission Members the performance of the work by Plaintiff to date and the amount due therefor, and upon such certification the Road Commission and Commission Members be compelled to perform their duty to issue the requisition of the Road Commission to the State Auditor for payment thereof.

3. That the Road Commission, the Road Commissioner, and Construction Director be compelled to return the necessary Proje[illegible] Engineer to said project to proceed with his customary [illegible]s in connection therewith, and be restrained from any interference with the Plaintiff in his return to said work, and restrained from any interference with the Plaintiff in his work except for good cause subsequent arising.

4. That the Road Commission and the Road Commissioner be enjoined from letting any other or further contract to any other person for the balance of the work to be performed on said project, except for good cause subsequently arising.

5. For such other and further relief, both general and ecial, as to the Court may seem appropriate in the emises.

/s/ CARNEY M. LAYNE
Attorney at Law
638 Fifth Avenue
Huntington, West Virginia

/s/ CHARLES W. YEAGER
Steptoe & Johnson
Attorneys at Law
Kanawha Valley Building
Charleston, West Virginia

Attorneys for the Plaintiff Howard Price dba Howard Price and Company

APPENDIX J

HOWARD PRICE, d/b/a
HOWARD PRICE & COMPANY,

Plaintiff,

vs. For Declaratory Judgment and Coercive Relief
Civil Action No. 3479

THE STATE ROAD COMMISSION
OF WEST VIRGINIA, *et al,*

Defendants.

STATE OF WEST VIRGINIA,

COUNTY OF CABELL, to-wit:

REPLY AFFIDAVIT IN OPPOSITION TO PAPER WRITINGS FILED HEREIN BY DEFENDANTS AND STYLED MOTION FOR SUMMARY JUDGMENT AND MOTION TO DISMISS FOR WANT OF JURISDICTION, AND THE AFFIDAVITS ATTACHED THERETO

Howard Price, being by me first duly sworn, deposes and says as follows:

1. That he resides at 2829 Roseneath Road, Huntington, Cabell County, West Virginia; that he is the plaintiff in Civil Action No. 3479 now pending in the Circuit Court of Kanawha County, West Virginia, styled "Howard Price dba Howard Price & Company v. State Road Commission, a corporation, et als"; that he makes this affidavit in opposition to the paper writings filed herein by the defendants and styled "Motion for Summary Judgment" and "Motion to Dismiss for Want of Jurisdiction," and that he has personal knowledge of the facts herein set forth.

2. That he is fifty-six years of age; that he has been in the highway construction business all of his adult life; that

moth his father and grandfather were highway contractors before him; that in 1927 he became associated with his father and four brothers in the highway construction business as a principal in the firm known as Price Construction Company, Inc.; that in 1948 he started his own highway construction firm, doing business as Howard Price & Company, and that at that time was prequalified before the State Road Commission of West Virginia to the extent of Fifty Thousand Dollars ($50,000.00); that the amount of a contractor's prequalification is determined by his assets, experience and record of performance, and that in May 1961 his prequalification amount had been increased by the State Road Commission to Two Million, Nine Hundred Thousand Dollars ($2,900,000.00); that his work has been principally grading and draining, as was the work in question in this proceeding; that either as a principal in the corporation aforesaid or through his own firm he has held contracts from the State Road Commission of West Virginia, the Department of Highways for the State of Kentucky, the Department of Highways for the State of Ohio, the United States Engineers, the U. S. Department of the Navy, the C. & O. Railway, and other governmental agencies and companies; that previous to the time the Road Commission declared the supposed default as alleged in the affidavit of R. D. Bryant, he has never defaulted in any contract or had any work taken from him; that the majority of his contracts in the thirty-six years in which he has been a principal in the corporation aforesaid or owned his own contracting firm, have been for the State Road Commission of West Virginia, and to his knowledge said Commission has never expressed any dissatisfaction with the performance of his contracts, previous to the contract involved in the proceeding above mentioned.

3. That until he was removed by the State Road Commission from the project involved in this proceeding, he personally supervised the performance of the work thereon, and the facts alleged in the complaint filed by him are true.

4. That he has read the affidavits made by R. D. Bryant and Wison Ward, each of which is styled "Affidavit in Support of Motion To Dismiss and Motion for Summary Judgment."

5. That he has closely observed the progress of the work of V. N. Green & Co., Inc. on the project involved in this proceeding, and that the final measurement of qualities of work performed thereon could have been made and concluded any time within the past sixty days.

6. That there is no bona fide substantial controversy as to his compliance with the contract, and the items of work and service performed and rendered by him, the quantities thereof or the amounts due therefor.

7. That on further proceedings he will offer in evidence documents, records and competent and qualified testimony which will show that there is no bona fide substantial controversy as to his compliance with the contract, the items of work and service performed and rendered by him, and the quantities thereof and amounts due therefor.

HOWARD PRICE.

Taken, subscribed and sworn to before me by Howard Price in my County and State aforesaid, this the 5th day of December, 1963.

My commission expires March 19, 1969.

L. J. MEISEL,
Notary Public in and for
Cabell County

Office-Supreme Court, U.S.
FILED
JUN 15 1965
JOHN F. DAVIS, CLERK

No. 144

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1964

HOWARD PRICE D/B/A HOWARD PRICE AND COMPANY
Appellant

v.

THE STATE ROAD COMMISSION OF WEST VIRGINIA, A CORPORATION, BURL A. SAWYERS, AS STATE ROAD COMMISSIONER, AND WILSON H. WARD, AS DIRECTOR OF THE CONSTRUCTION DIVISION, STATE ROAD COMMISSION OF WEST VIRGINIA
Appellees

ON APPEAL FROM THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

MOTION TO DISMISS APPEAL FOR LACK OF JURISDICTION

C. ROBERT SARVER
Assistant Attorney General
State of West Virginia
Charleston, West Virginia

C. DONALD ROBERTSON
Attorney General
State of West Virginia
Charleston, West Virginia

PHILIP J. GRAZIANI
Assistant Attorney General
State of West Virginia
Charleston, West Virginia

Counsel for Appellees

No. ___

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1964

HOWARD PRICE, d/b/a HOWARD PRICE AND COMPANY

Appellant

v.

THE STATE ROAD COMMISSION OF WEST VIRGINIA, a corporation, BURL A. SAWYERS, AS STATE ROAD COMMISSIONER, AND WILSON H. WARD, AS DIRECTOR OF THE CONSTRUCTION DIVISION, STATE ROAD COMMISSION OF WEST VIRGINIA

Appellees

ON APPEAL FROM THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

MOTION TO DISMISS APPEAL FOR LACK OF JURISDICTION

MOTION TO DISMISS

Appellees, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, move that the jurisdictional statement of appellant be dismissed on the ground that the federal question sought to be reviewed was not timely or properly raised in the Circuit Court of Kanawha County, West Virginia, and on the further ground that the state court did not expressly pass on the federal question sought to be reviewed.

STATEMENT OF THE CASE

Appellant entered into a highway construction contract with the Road Commission for the construction of a portion of Interstate Highway 64. The Road Commissioner declared the performance of appellant under his contract to be in default, and caused the appellant to be removed from the project. The appellant alleges that the Road Commissioner acted arbitrarily and without right or authority, and from this basic difference in positions there arises a multitude of substantial controversies of fact.

The appellant instituted a declaratory judgment proceeding in the Circuit Court of Kanawha County, West Virginia, seeking declaratory judgment as to the rights of appellant under the construction contract entered into by him and the State Road Commission of West Virginia, asking: (1) That the rights of the parties be declared; and, sequentially, (2) That, after a declaration of rights, the Commissioner be compelled to perform

his statutory duty to audit appellant's claim for work performed by appellant.

On May 19, 1964, the Court entered its final judgment order sustaining appellees ' motion to dismiss the proceeding as a suit against the State. This is the judgment upon which review is sought.

ARGUMENT

I

Appellant's principal contention is that he has been deprived of his property without due process of law. He complains of the fact that he has not had his day in court, and has had no judicial determination of the merits of his case.

The Supreme Court of the United States lacks jurisdiction of appellant's case because appelant has not exhausted his remedies in the State of West Virginia. The existence of ample and efficient administrative remedies under State laws, and the failure of appellant to resort to them in the state court, prevents him from taking advantage of a federal question involved in the case, and securing a review by the federal Supreme Court. Mellon Co. v. McCafferty, 239 U. S. 134. Certiorari does not lie to determine whether State procedure deprives one of due process if petitioner has not invoked the proper state remedy to have such matter determined. Phyle v. Duffy, 334 U. S. 431.

Article III, Section 9, of the Constitution of West Virginia, states:

> "Private property shall not be taken or damaged for public use, without just compensation; nor shall the same be taken by any company, incorporated for the purposes of internal improvement, until just compensation shall have been paid, or secured to be paid, to the owner; and when private property shall be taken, or damaged, for public use, or for the use of such corporation, the compensation to the owner shall be ascertained in such manner, as may be prescribed by general law; provided, that when required by either of the parties, such compensation shall be ascertained by an impartial jury of twelve freeholders.

In effect, appellant is complaining that, in addition to the Fourteenth Amendment to the United States Constitution, the above-cited provision has been violated as well, and that his property, services and livelihood has been "taken" by the actions of the State Road Commissioner. If this be the case, appellant's proper, and still available, course was and is to institute proceedings in mandamus to compel Eminent Domain proceedings. State v. Graney, 143 W. Va. 643, 103 S. E. 2d 888; Riggs v. State Road Commissioner, 120 W. Va. 298, 197 S. E. 813; Hardy v. Simpson, 118 W. Va. 440, 190 S. E. 680; Childers v. State Road Commissioner, 124 W. Va. 233, 19 S. E. 2d 611. These cases uphold the proposition that such mandamus action will lie.

This is not to be confused with the mandamus procedure upheld by the West Virginia Supreme Court of Appeals in Draper v. Anderson, 102 W. Va. 633, 135 S. E. 837. In Draper, there was no great controversy over facts. The labor had been performed under a contract and the Road Commissioner has a "plain legal duty" to issue a warrant to the Auditor. In the present case, there is a controversy as to whether appellant did perform his part of the contract.

The Circuit Court of Kanawha County, in considering this declaratory judgment proceeding, held that the rights of appellant in this proceeding could rise no higher than the rights the appellant would have in an application for a writ of mandamus under the holding in the case of Draper v. Anderson, Supra, because the nature of the relief sought was the payment of money out of the treasury of the State for claims uncontrovertedly shown to involve substantial controversies of fact by the affidavits filed with appellees' motion to dismiss the complaint for lack of jurisdiction.

While the issue of eminent domain proceedings in connection with personal property is not as well established as is that issue as concerns real estate, it is not unknown. A court of claims case has held that a contractual right is within the protection of the Fifth Amendment prohibiting the taking of private property for public use without just compensation. Johnson v. United States, 79 F. Supp. 208. A Texas decision has held that a "going business" is "property" for which recovery can be had in eminent domain

proceedings. Priolo v. City of Dallas, 234 S. W. 2d 1014.

Article III, Section 9, supra, of the West Virginia Constitution, contains no qualification that the "property" can be only real property, nor does the Fourteenth Amendment to the Constitution of the United States, relied upon by appellant. In addition, eminent domain proceedings instituted by the Road Commissioner would ensure a full judicial hearing, with a jury, as desired by appellant. He would have his day in court to air the issues.

II

Appellant has also failed to make use of the procedures for making claims against the State in accordance with Chapter 14, Article 2, of the Code. As stated in Section 1 of the above-cited Chapter and Article:

> "The purpose of this article is to provide a simple and expeditious method for the consideration of claims against the state that because of the provisions of section thirty-five, article six of the constitution of the state, and of statutory restrictions, inhibitions or limitations, cannot be determined in a court of law or equity; and to provide for proceedings in which the state has a special interest."

Prior to 1953, these matters came under the State Court of Claims, but now they are administered by the Attorney General, who, like the

Court of Claims, "* * * is hereby authorized to act as a special instrumentality of the legislature for the purpose of considering claims against the state, which because of the provisions of section thirty-five, article six of the constitution of the state, * * * cannot be heard in a court of law * * *." Code 14-2-3. (Section 35, Article VI is the governmental immunity from suit provision.)

Code 14-2-4 confers the Attorney General's jurisdiction:

"The jurisdiction of the attorney general, under the provisions of this article, except for the claims excluded below, shall extend to the following matters:

"1. Claims and demands, liquidated and unliquidated, ex contractu and ex delicto, against the state or any of its agencies, which the state as a sovereign commonwealth should in equity and good conscience discharge and pay.

"2. Claims and demands, liquidated and unliquidated, ex contractu and ex delicto, which may be asserted in the nature of set-off or counterclaim on the part of the state or any of its agencies.

"3. The legal or equitable status, or both, of any claim referred to the attorney general by the head of a state agency for advisory determination."

Code 14-2-5 provides:

"The jurisdiction of the attorney general shall not extend to any claim:

"1. For loss, damage, or destruction of property or for injury or death incurred by a member of the militia or national guard when in the service of the state.

"2. For injury to or death of an inmate of a state penal institution.

"3. Arising out of the care or treatment of a person in a state institution.

"4. For a disability or death benefit under chapter twenty-three of this Code.

"5. For unemployment compensation under chapter twenty-one-a of this Code.

"6. For relief or public assistance under chapter nine of this Code.

"7. With respect to which a proceeding may be maintained by or on behalf of the claimant in the courts of the state."

III

Appellant has been told by the Circuit Court of Kanawha County and by the Supreme Court of Appeals that he cannot maintain his action utilizing the remedy that he has selected, i.e.,

declaratory judgment proceedings, since such proceedings, and the relief sought therein, if fully granted, would result in the controlling of the discretion of an official of the State, in a situation where such official must exercise his discretion in order to carry out the duties of his office. See Douglass v. Koontz, 137 W. Va. 345, 71 S. E. 2d 319.

The declaratory judgment proceeding chosen by appellant is a suit against the State in violation of Article VI, Section 35, of the West Virginia Constitution, and therefore the Circuit Court of Kanawha County properly sustained appellees' motion to dismiss the complaint for lack of jurisdiction.

CONCLUSION

Appellant has the protection of Article III, Section 9, of the Constitution of West Virginia, and has the perfect right to seek a writ of mandamus to require the Road Commissioner to institute eminent domain proceedings to award just compensation for property allegedly taken by the Road Commissioner for public use. In the event that appellant is denied such a writ of mandamus, then appellant has the statutory right to prosecute a claim against the State of West Virginia under the provisions of Chapter 14 of the Code of West Virginia.

For the reasons herein cited and discussed, it is respectfully submitted that appellant has not exhausted his remedies under the Constitu-

tion and the laws of the State of West Virginia, therefor the federal question is not properly before the court and accordingly his application for appeal should be denied.

Respectfully submitted,

C. DONALD ROBERTSON
Attorney General
State of West Virginia
Charleston, West Virginia

PHILIP J. GRAZIANI
Assistant Attorney General
State of West Virginia
Charleston, West Virginia

Counsel for Appellees.

BLANK PAGE

SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
JUL 3 1965
JOHN F. DAVIS, CLERK

No. 144

IN THE

Supreme Court of the United States

October Term, 1964

HOWARD PRICE D/B/A HOWARD PRICE AND COMPANY

Appellant

v.

THE STATE ROAD COMMISSION OF WEST VIRGINIA, A CORPORATION, BURL A. SAWYERS, AS STATE ROAD COMMISSIONER, AND WILSON H. WARD, AS DIRECTOR OF THE CONSTRUCTION DIVISION, STATE ROAD COMMISSION OF WEST VIRGINIA

Appellees

ON APPEAL FROM THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

APPELLANT'S BRIEF IN OPPOSITION TO APPELLEES' MOTION TO DISMISS FOR LACK OF JURISDICTION

CARNEY M. LAYNE
638 Fifth Avenue
Huntington, West Virginia

CHARLES W. YEAGER
608 Kanawha Valley Building
Charleston, West Virginia

Attorneys for Appellant

JARRETT PRINTING COMPANY, CHARLESTON, W. VA.

INDEX

	Page
STATEMENT OF THE CASE	1
ARGUMENT	2
I. APPELLEES' ASSIGNED GROUNDS FOR DISMISSAL ARE WITHOUT MERIT AND ARE REFUTED BY THE RECORD	2
II. APPELLEES' ARGUMENT OUTSIDE THE ASSIGNED GROUNDS IS EQUALLY WITHOUT MERIT	3
1. Appellant has Exhausted All Remedy in the State Court. The Trial Court's Dismissal was Not Based on Any Question of Appropriateness of Remedy, But Upon The Application To The Case of The Immunity Provision of The State Constitution.	4
2. The Remedy By Mandamus, As Appellees Suggest Pro Hac Vice on This Motion to Dismiss, Has Already Been Ruled Upon By The Trial Court and Decided Adversely to Appellant.	4
3. The United States Supreme Court Cases Cited By Appellees Have No Application To the Case at Bar.	7
4. The Protection of Appellant By the Provision of The State Constitution Prohibiting The Taking of Private Property For Public Use Without Just Compensation, As Appellees Suggest Pro Hac Vice On This Motion To Dismiss, Has Already Been Ruled Upon By The Trial Court and Decided Adversely To Appellant.	8

Page

5. Appellees' Suggestion of Presentation By Appellant of Claim To The Attorney General For Consideration and Possible Recommendation To The State Legislature As A Moral Obligation of The State, Is Not a Judicial Remedy and Is No Substitute For Due Process of Law. 9

CONCLUSION ---------- 9

CITATIONS

CASES:

Ickes v. *Fox*, 300 U.S. 82, 96 ---------- 1
Draper v. *Anderson*, 102 W.Va. 733, 135 SE 837 ---------- 5
Black v. *Fortney*, 108 W.Va. 41, 151 SE 319 ---------- 5
State v. *Graney*, 143 W.Va. 643, 103 SE 2d 888 ---------- 6
Riggs v. *State Road Commissioner* 120 W.Va. 298, 197 SE 813 ---------- 6
Hardy v. *Simpson*, 118 W.Va. 440, 190 SE 680 ---------- 6
Childers v. *State Road Commissioner*, 124 W.Va. 233 19 SE 2d 611 ---------- 6
Priolo v. *City of Dallas*, 234 SW 2d 1014, reversed 240 SW 2d 761 ---------- 6, 7
Johnson v. *United States*, 79 F. Supp. 208 ---------- 7
Mellon Company v. *McCafferty*, 239 U.S. 134 ---------- 7
Phyle v. *Duffy*, 234 U.S. 431 ---------- 7
Land v. *Dollar*, 330 U.S. 731, 738 ---------- 9

FEDERAL CONSTITUTIONAL PROVISION:

Section 1, Fourteenth Amendment ---------- 2, 3, 4, 9, 10

STATE CONSTITUTIONAL PROVISIONS:

Section 35, Article VI, Constitution of West Virginia ---------- 2, 3, 4, 6, 8
Section 9, Article III, Constitution of West Virginia ---------- 8

Page

TATE STATUTES:

Code of West Virginia, 1931, as Amended:

Chapter 17:

Article 2A, Section 8(5) ---------- 6

Article 4, Section 5 ---------- 6

Chapter 14:

Article 2 ---------- 9

TATE RULES OF CIVIL PROCEDURE:

Rule 57, "Declaratory Judgment" ---------- 4

No. 1170

IN THE

Supreme Court of the United States

October Term, 1964

HOWARD PRICE D/B/A HOWARD PRICE AND COMPANY

Appellant

v.

THE STATE ROAD COMMISSION OF WEST VIRGINIA, A CORPORATION, BURL A. SAWYERS, AS STATE ROAD COMMISSIONER, AND WILSON H. WARD, AS DIRECTOR OF THE CONSTRUCTION DIVISION, STATE ROAD COMMISSION OF WEST VIRGINIA

Appellees

ON APPEAL FROM THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

APPELLANT'S BRIEF IN OPPOSITION TO APPELLEES' MOTION TO DISMISS FOR LACK OF JURISDICTION

STATEMENT OF THE CASE

The complaint shows, and for jurisdictional purposes here, as well as on Motion to Dismiss in the Trial Court, it must be taken as true, *Ickes* v. *Fox*, 300 U.S. 82, 96, that by arbitrary action of the State Road Commissioner, under color of office and without authority, the Road Commission wrongfully abrogated Appellant's interstate highway construction contract, put him off the project and refused to

audit his claim for payment of $1.3 Million due under the contract for his work and materials incorporated in the public roadway. *This is the major thrust of Appellant's complaint.* Appellant's complaint was for a declaratory judgment wherein he sought to establish his rights, and sequentially to enforce them by compelling the Road Commissioner to perform his statutory duty. Appellees met Appellant's charges with a motion to dismiss on the ground that the proceeding was an action against the State of West Virginia and prohibited by Section 35, Article VI of the State Constitution. Appellant was turned out of the state courts without a hearing on that ground.

ARGUMENT

I.

APPELLEES ASSIGNED GROUNDS FOR DISMISSAL ARE WITHOUT MERIT AND ARE REFUTED BY THE RECORD

The grounds assigned by Appellees in support of their Motion to Dismiss are: (a) That the Federal questions sought to be reviewed were not timely or properly raised; and (b) that the state court did not expressly pass on the federal questions sought to be reviewed. *No further reference is made by Appellees to these grounds, and their motion is devoid of any reference to the record or any argument in support thereof.*

On the motion to dismiss in the Trial Court, no responsive pleading was allowed under the State Rules of Civil Procedure. The federal questions were raised by Appellant by argument in opposition to Appellees' motion to dismiss (Jurisdictional Statement, p. 7; Appendix H thereto, Order Certifying Existence of Federal Question, p. 28a). The *raising of* the federal questions is noted in:

(1) The Trial Court's opinion of November 7, 1963 (Jurisdictional Statement, p. 8; Appendix A thereto p. 6a);

(2) The final order of the Trial Court granting Appellees' motion to dismiss (Jurisdictional Statement p. 8; Appendix E thereto p. 22a);

(3) The Assignment of Errors contained in Appellant's Petition to the Supreme Court of Appeals of West Virginia (Jurisdictional Statement, p. 8); and

(4) The Trial Court's Order Certifying Existence of Federal Questions (Jurisdictional Statement, p. 9; Appendix H thereto, p. 28a).

The *passing upon* such federal questions by the Trial Court is evidenced by:

(1) The Trial Court's opinion;

(2) The Trial Court's final order granting Appellees' motion to dismiss; and

(3) Its Order certifying Existence of Federal Questions, all as referred to above.

We submit Appellees' assignment of supposed grounds for dismissal of this appeal is altogether without merit and is conclusively refuted by the record.

II.

APPELLEES' ARGUMENT OUTSIDE THE ASSIGNED GROUNDS IS EQUALLY WITHOUT MERIT

Without assigning any grounds as a basis therefor Appellees argue:

(1) That Appellant should have brought a mandamus proceeding *to require* the Road Commissioner to condemn his property in the public road under the State eminent domain statutes; and

(2) That "*in the event that Appellant is denied such a writ of mandamus*" (Motion to Dismiss, p. 9) then Appellant can present his claim to the Attorney General, *Appel-*

lees' counsel herein, requesting him, under the State statute to consider the claim, to the end he *may* recommend to the Legislature that Appellant's claim be recognized *as a moral obligation of the State,* and for the satisfaction of which the Legislature *may* make some appropriation.

1. Appellant Has Exhausted All Remedy in the State Court. The Trial Court's Dismissal was Not Based On Any Question of Appropriateness of Remedy but Upon the Application to the Case of the Immunity Provision of the State Constitution

But for the state's asserted immunity, Appellant's declaratory judgment proceeding was an appropriate remedy encompassing every procedural remedy available to Appellant. Rule 57 of the West Virginia Rules of Civil Procedure, entitled "Declaratory Judgments" (Jurisdictional Statement, Appendix D, page 20a), provides that "the existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate." Appellees' motion to dismiss in the Trial Court was not grounded on choice or appropriateness of remedy, but solely upon the Trial Court's *lack of jurisdiction* to afford any remedy to Appellant. The basis of the Trial Court decision in turn does not concern a choice of remedies, but *concerns whether any remedy is available to Appellant as against Appellees' interposition of the State's Constitutional immunity.* (Jurisdiction Statement, Appendix B, Letter Opinion of April 13, 1964, p. 16a). It is the application of this constitutional immunity provision to the facts of this case which raises the Federal questions. By the Trial Court's application of the immunity provision, Appellant can have no remedy whatsoever.

2. The Remedy By Mandamus, As Appellees Suggest Pro Hac Vice On This Motion to Dismiss, Has Already Been Ruled Upon By the Trial Court and Decided Adversely to Appellant

The Trial Court's opinion stated that as a declaratory judgment proceeding against a public official, this proceed-

ing was to be governed by the same rules governing mandamus. The Trial Court then considered it as such, and held that mandamus would not lie because it appeared there was a *"substantial controversy of fact"* (Jurisdictional Statement, Appendix B., Letter Opinion of April 13, 1964, p. 11a, 13a, 16a).

The only State decisions on mandamus applicable to the situation in the case at bar are *Draper* v. *Anderson,* 102 W.Va. 733, 135 SE 837, and *Black* v. *Fortney,* 108 W.Va. 41, 151 SE 319. *Both concerned claims by contractors against the State Road Commission and Road Commissioner as in the case at bar, and both turned on whether or not there was involved a "substantial controversy of fact." It was on the basis of these two decisions, that the Trial Court dismissed Appellant's action* (Judisdictional Statement, Appendix A, Letter Opinion of April 13, 1964, p. 7a). The Trial Court has accordingly already decided that mandamus will not lie.

Appellant notes that the Trial Court's ruling on Appellees' first motion to dismiss would have allowed Appellant to proceed as to his rights under the contract for the *work already performed and incorporated into the highway,* since at that point there was no *substantial controversy of fact* appearing on the pleadings. The Trial Court's ruling on the first motion precluded Appellant from further proceeding on items of relief *other* than eventual recovery for the work already performed and incorporated into the highway. It did so on the ground that such other relief involved discretion. With the passage of time such other relief became moot. *This holding on the relief requested and found to be discretionary is not involved in this appeal and was not involved on Appellees' second motion to dismiss. For the precise purpose of creating a "controversy of fact" on the pleadings and defeating Appellant's action considered as a mandamus,* Appellees filed their second motion to dismiss (almost verbatim their first motion) to which they attached

affidavits designed to show that a "controversy of fact" existed as to Appellant's work and materials incorporated in the highway. This was the only item on which Appellant remained in court after the rulings on the first motion and the only aspect of the case to be reached on the second motion to dismiss. Thus, in the light of the Trial Court's previous application of the constitutional immunity provision, Appellees precluded Appellant from further proceeding.

This action was instituted on May 24, 1963. It has been strenuously resisted by Appellees since the filing of the complaint. For almost a year the action was contested in the Trial Court upon Appellees' two motions to dismiss and various other and provisional pleadings, during all of which Appellees insisted upon the application to the case of the constitutional immunity provision as a *complete denial of any judicial remedy to Appellant. Now for the first time in this Court, Appellees suggest that Appellant should institute proceedings to require the Road Commissioner to institute eminent domain proceedings.* Appellees' own lack of faith in such suggestion is demonstrated by the statement in the Conclusion contained in their Motion to Dismiss (p. 9), that *"In the event that Appellant is denied such a writ of mandamus,"* then Appellant can present his claim as a moral obligation of the State.

The state statutes conferring the power of eminent domain upon the State Road Commission expressly pertain only to *real estate.* (Chapter 17, Article 2A, Section 8 (5), and Article 4, Section 5, Code of West Virginia, 1931, as amended; same, Michie's West Virginia Code of 1961, Serial Sections 1448 (8)(5) and 1461 respectively).

The four condemnation decisions of the West Virginia Supreme Court of Appeals, relied upon by Appellees (Motion to Dismiss, p. 4), all involve the *condemnation of real estate.* The case of *Priolo* v. *City of Dallas,* 234 SW 2d 1014 decided by the Texas Court of Appeals and cited by

Appellees for the proposition that a business is property for which recovery can be had under eminent domain, was *reversed* by the Supreme Court of Texas (240 SW 2d 761). The *Priolo* case is of extremely doubtful relevance to the case at bar, but in any event, the West Virginia case authority is in accord with the *reversal.* Appellees also rely on *Johnson* v. *United States,* 79 F. Supp. 208. It does not involve eminent domain, but concerns the salary of a Federal judge and the rights under the statute providing for it. It is inapplicable to both the case at bar and Appellees' suggestion. *There is no West Virginia authority, statutory or otherwise, which supports Appellees' suggestion and the eminent domain statutes are to the contrary.* The statutes relating to eminent domain and the procedure therefor are clearly tailored for determining the value of interests in land and not for a situation such as is presented by this case.

3. The United States Supreme Court Cases Cited By Appellees Have No Application to the Case At Bar

Appellees cite *Mellon Company* v. *McCafferty,* 239 U.S. 134 and *Phyle* v. *Duffy,* 234 U.S. 431 as authority for their suggestion. (Motion to Dismiss, p. 3). Neither of these decisions have any application to this case. In the *Mellon* case the appellant did not in the *first instance* seek relief through the administrative procedure set up by the State for the correction of erroneous tax assessments and which by appeal could culminate in the courts. Instead, he went *directly* into the courts and was refused relief on that ground.

In the *Phyle* case the petitioner had been refused a habeas corpus in the State Court on the ground that mandamus was the proper remedy. On appeal to the U.S. Supreme Court, the State Attorney General *unequivocally declared* (p. 441) that petitioner had an ample and clear remedy by mandamus. There was no authority, statutory or case, to the contrary, *and nothing in the state Court's opinion that was in conflict with the Attorney General's opinion* (p. 441). This Court dismissed the certiorari.

In both of these cases the defendants in the lower court raised the point of a procedural impropriety and the cases were decided thereon. *That is not the case at bar. The case at bar was decided on the application of the constitutional immunity provision to the action.* The Trial Court by applying the immunity provision, decided that it lacked jurisdiction except for a proceeding in mandamus to compel performance of a statutory duty, but that mandamus would not lie because there existed a "substantial controversy of fact", and that accordingly Appellant had no remedy.

The suggestion of mandamus by Appellees' Counsel, the State Attorney-General, *is conclusively contradicted by the Trial Court's own opinion and decision that mandamus would not lie.* (Jurisdictional Statement, p. 14; Appendix B thereto, Opinion of April 13, 1964, pp. 11a, 15a).

4. The Protection of Appellant By the Provision of the State Constitution Prohibiting the Taking of Private Property for Public Use Without Just Compensation, As Appellees Suggest Pro Hac Vice On This Motion to Dismiss, Has Already Been Ruled Upon By the Trial Court and Decided Adversely to Appellant

Appellees suggest that Appellant is protected by Section 9, Article III of the State Constitution prohibiting the taking or damaging of private property for public use. (Motion to Dismiss, p. 4). The protection of this provision in the State Constitution *was relied* upon by Appellant in the Trial Court in the arguments on the motions to dismiss. It is noted in Appellant's objections contained in the Order of Dismissal (Jurisdictional Statement, Appendix E, p. 22a). It was also raised in Appellant's Assignment of Errors (Record p. 31) contained in his petition for appeal to the Supreme Court of West Virginia (Jurisdictional Statements, p. 8).

The Trial Court has accordingly already ruled upon this suggestion and decided it adversely to Appellant.

5. Appellees' Suggestion of Presentation By Appellant of Claim to the Attorney General for Consideration and Possible Recommendation to the State Legislature As a Moral Obligation of the State Is Not a Judicial Remedy and Is No Substitute for Due Process of Law

Appellees suggest as a last resort, "in the event that Appellant is denied" a writ of mandamus (Motion to Dismiss, pp. 6, 9), he may pursue his claim under the State statute as a *moral obligation of the State.* (Chapter 14, Article 2, Code of West Virginia, 1931, as amended by Acts of the West Virginia Legislature, Regular Session 1953, Chapter 18; Michie's West Virginia Code of 1961, Serial Sections 1143 et seq.) It should be noted that the statute cited relating to claim procedure before the Attorney General expressly excludes any claim "7. With respect to which a proceeding may be maintained by or on behalf of the claimant in the courts of the State." (Motion to Dismiss, p. 8). Thus, *all other considerations aside, it is apparent that Appellees suggestion begs the question of whether Appellant should be provided a judicial forum in which to establish and enforce his rights.*

This statute provides for the presentation of claims to the State Attorney General, *who appears here as counsel for Appellees,* to consider and hear evidence, if need be, to the end he *may* recommend to the Legislature that a claim be recognized as a *moral obligation of the State,* and for which the Legislature *may* make some appropriation for its satisfaction.

It has been held insofar as Federal officials are concerned, that in the case of abuse of power of office, a claimant will not be relegated to a court of claims. *Land* v. *Dollar,* 330 U.S. 731, 738.

What Appellees are in essence suggesting is that Appellant *abandon the judicial forum* and submit the protection of his constitutional rights to the *whim and caprice of the political arena. This is no remedy at all.*

Appellant's constitutional right of due process and protection in his property is not to be so lightly treated. Constitutional rights are peculiarly within the sphere of judicial protection. A recommendation by the Attorney-General, in his discretion to be *made or denied*, for a legislative gratuity to be *given or withheld*, is not due process of law and not a substitute for the judgment of a court of justice.

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted,

June 26, 1965

CARNEY M. LAYNE
638 Fifth Avenue
Huntington, West Virginia

CHARLES W. YEAGER
608 Kanawha Valley Building
Charleston, West Virginia